Supreme Court, U.S.
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No. 06-270

In The

# Supreme Court of the United States

WILLIAM ADKINS,

*Petitioner,*

v.

GENERAL MOTORS CORPORATION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I.

WHETHER, CONTRARY TO ESTABLISHED FEDERAL PRECEDENT, THE COURT OF APPEALS IMPROPERLY EXERCISED SUBJECT MATTER JURISDICTION IN THIS CASE WHERE THE SINGLE FEDERAL CLAIM, UPON WHICH JURISDICTION WAS ORIGINALLY PREMISED, HAD BEEN DISMISSED BEFORE TRIAL IN THE DISTRICT COURT.

II.

WHETHER THE COURT OF APPEALS' AFFIRMATION OF THE DISTRICT COURT'S DISMISSAL OF MR. ADKINS' ADDCA CLAIM ON NEW GROUNDS NOT PREVIOUSLY CONSIDERED BY THE LOWER COURT CONSTITUTED AN ERROR OF LAW AND CREATED CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

III.

WHETHER INDIVIDUAL AUTOMOBILE DEALERS ARE WITHIN THE CLASS OF PERSONS FOR WHOSE PROTECTION THE ADDCA WAS ENACTED, AND THUS, HAVE STANDING TO ASSERT CLAIMS UNDER THE ADDCA. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SUBSTANTIAL EXISTING CONFLICTS AMONG THE CIRCUIT COURTS OF APPEALS.

IV.

WHETHER THE COURT OF APPEALS VIOLATED THE PRINCIPLES OF COMITY AND FEDERALISM IN FAILING TO FOLLOW PRECEDENT FROM DELAWARE'S HIGHEST COURT THAT GOVERNS THE ISSUES IN THIS CASE.

## LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this Petition are as listed in the caption of the case.

Pursuant to Supreme Court Rule 29.6, Petitioner states that the Petitioner is not a nongovernmental corporation and therefore has nothing to disclose under Supreme Court Rule 29.6.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, William Adkins, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit:

## OPINIONS BELOW

The judgment in the federal district court is unreported and is included within the Appendix accompanying this Petition. SCA-26.

The judgment of the Second Circuit Court of Appeals in *Adkins v. GM*, 170 Fed.Appx. 184 (2d Cir. 2006), dated March 3, 2006, is included within the Appendix accompanying this Petition. SCA-1-7.[1] In its March 3, 2006 "Summary Order" the Second Circuit Court of Appeals, states that it "will not be published in the Federal Reporter and may not be cited as precedential authority to this or any other Court." SCA-1.

The Second Circuit's denial of Petitioner's petition for panel rehearing and rehearing *en banc*, dated May 25, 2006, is unreported and is included within the Appendix accompanying this Petition. SCA-38-39.

[1] Citations to the Supreme Court Appendix accompanying this Petition are referenced throughout the Petition as "SCA-____." Citations to the Appendix filed with the United States Court of Appeals for the Second Circuit are referenced throughout this Petition as "A-___."

## BASIS FOR SUPREME COURT JURISDICTION

The United States Court of Appeals for the Second Circuit entered its summary order on March 3, 2006, vacating the judgment entered in the United States District Court for the Eastern District of New York and affirming other aspects of the lower court's pre-trial rulings. SCA-1-7.

On April 7, 2006, the Petitioner timely filed a petition for panel rehearing and rehearing *en banc*.[2] On May 25, 2006, the Court of Appeals filed an order denying both the petition for panel rehearing and the petition for rehearing *en banc*. SCA-38-39.

The Petitioner, William Adkins, seeks review of the decision of the Second Circuit on a writ of certiorari. The United States Supreme Court has jurisdiction under 28 U.S.C. §1254(1) to review the judgment of the Second Circuit Court of Appeals on a writ of certiorari. This Petition is timely filed in accordance with 28 U.S.C. §2101(c) and under Rule 13.3, Rules of the Supreme Court.

## PROVISIONS INVOLVED

The relevant statutory provisions are set forth in the Appendix accompanying this Petition.

[2] The Petitioner had filed and was granted an enlargement to file a petition for panel rehearing and rehearing *en banc* through and including April 7, 2006.

## STATEMENT OF THE CASE

### A. Background

In 1994, General Motors Corporation ("GM") and William Adkins ("Mr. Adkins") collectively acquired the assets of Palanker Chevrolet Inc. ("Palanker"), an existing automobile dealership located in West Babylon, New York. The structure of the venture was a close Delaware corporation formed according to GM's Motors Holding Investment Plan ("MHIP"). The MHIP structure was extremely profitable for GM because it was allowed to reap tremendous financial rewards through the sale of its vehicles to the dealership, a 15% return on investment in addition to even greater financial benefits if the dealership turned a profit, and GM's financing arm, GMAC, would receive even more profits. A-1417-1440; A-534; A-756.

The MHIP structure was not only financially beneficial to GM, it was necessary because New York's Franchised Motor Vehicle Dealer Act, N.Y. Veh. & Traf.Law §460 *et seq.* (McKinney 2002), prohibits direct ownership of automobile dealerships by automobile manufacturers. N.Y. Veh. & Traf.Law §463 (bb). Mr. Adkins was required to make a significant financial investment in the dealership from the outset constituting approximately one-half of his family's net worth or $240,000.00. In return, Mr. Adkins was issued 2,400 shares of common stock, while GM retained control of 12,600 shares of preferred stock, which GM valued at $1.26 million. A-54-55; A-105-106.

The structure of the venture was such that Mr. Adkins, the dealer principal, was to become sole shareholder and owner of the dealership through the periodic redemption of GM's stock from the dealership

profits over a period of seven years. A-54-55; A-105-107. In fact, the sole motivation for Mr. Adkins to devote a substantial portion of his life's savings into this deal was the prospect of ultimately becoming the exclusive owner of the dealership. A-534. Agreements and assumptions supporting the established buyout period were made from the outset, among the most fundamental of which was the understanding that, at all times relevant, GM and its majority-controlled board would act in the dealership's best interests to ensure that Mr. Adkins would be able to own the dealership outright within seven years. A-737.

Mr. Adkins, along with GM employees, Paul Fields ("Mr. Fields") and Timothy Rinke ("Mr. Rinke"), were designated members of the Palanker dealership board. GM implemented this structure knowing that it would retain exclusive control over a supermajority vote on the dealership board through its board member operatives, Fields and Rinke, so long as even one single share of preferred stock remained outstanding. A-724; A-1360. Unfortunately for Mr. Adkins, the GM-appointed directors acted consistently throughout the parties' relationship to serve GM's interests at the expense of the dealership and Mr. Adkins' current and future ownership of the dealership, for whose benefit they were duty-bound to act. A-55-56; A-106-107.

Mr. Rinke even offered testimony that, at the same time that he was supposed to look out for the best interests of the dealer companies on whose boards he sat, he also knew that "GM expected [him] to look out for GM's interest[.]" A-722. He further acknowledged that he had a "good understanding" of what it means to be a fiduciary, and in the context of the Palanker dealership, he knew that he was "responsible for acting in the best interest of

the dealer companies . . . and that means in the best interest, in the case of West Babylon, of Bill Adkins[.]" A-722. Mr. Fields testified that while he took his fiduciary duties of good faith and loyalty to the Palanker dealership "very seriously," he also recognized that he often had a "two-colored hat on; the one that m kes me responsible for the majority shareholder [GM], as well as the minority shareholder [Mr. Adkins]." A-809; A-842.

GM also retained extensive control over the dealership's accounting practices. The dealership's board, controlled by GM's two hand-picked directors, selected the dealership's outside accounting firm, Lipner Gordon. The Lipner Gordon firm maintained an extensive relationship with GM. According to Mr. Rinke, Lipner Gordon served as the accountant for roughly 70-80% of the dealerships on which he sat as a GM-appointed director. A-725; A-727.

GM also recommended at inception that the dealership utilize Mary Gehrlein ("Ms. Gehrlein") as its secretary-treasurer after GM represented to Mr. Adkins that Ms. Gehrlein was an exceptionally good employee. A-1328. Under the MHIP program, GM also imposed detailed internal accounting requirements on Palanker and maintained close oversight of its financial affairs including sending its representatives to the Palanker dealership to conduct floor plan audits so that GM could verify all of the dealership's inventory. A-553. GM also established a dial-in number that afforded GM unlimited access to all of Palanker's financial activities by computer. A-554. Further, GM periodically dispatched accounting representatives to physically check and verify Palanker's books and records. A-553-554.

Additionally, GM empowered Lipner Gordon with unfettered authority to review and analyze the dealership's finances and to determine the extent to which Mr. Adkins would be permitted to redeem GM stock and become exclusive owner of the dealership. A-1363. Lipner Gordon's decision "would be final, conclusive and binding upon [the dealership], the Stockholders, and all other persons." *Id.* Indeed, GM acted as the exclusive decision-maker and maintained direct operational control over the Palanker dealership.

### B. GM Jeopardizes Mr. Adkins' Interest in Palanker

In late 1999, there were a series of shocking revelations that threatened to jeopardize Mr. Adkins' equitable and future ownership interest in Palanker. First, Mr. Adkins uncovered the astounding fact that Ms. Gehrlein, Palanker's secretary-treasurer, had been engaged in serious financial misconduct with the assets of Palanker. She had been pilfering dealership funds that were supposed to have been remitted to New York State for sales taxes and also likely paying bribes to state revenue officials. A-1543; A-571; A-764.

Following this bombshell, GM committed multiple instances of obstruction and other wrongful conduct, all of which illustrated GM's complete absence of good faith in its dealings with Mr. Adkins and his interest in the Palanker dealership. GM refused to permit a criminal investigation and would not permit criminal charges to be pursued regarding the Gehrlein theft because it wanted to "avoid negative publicity." A-570; A-723-724; A-764; A-816. Although the Gehrlein theft led to the doubtless conclusion that Lipner Gordon had committed gross accounting

malpractice in failing to uncover the scheme as the dealership's accountant, GM demanded that Mr. Adkins not pursue claims against Lipner Gordon. A-575; A-580; A-724-725; A-796. GM had bad-faith ulterior motives for refusing to permit a lawsuit against Lipner Gordon: it served as accountant for 70-80 percent of the dealerships controlled by GM's board member Mr. Rinke. GM further understood that Lipner Gordon had exclusive authority to determine if and when GM's shares could be purchased by Mr. Adkins. A-725; A-1363.

Not only did GM refuse to permit any remedies for the Gehrlein theft and the Lipner Gordon malpractice, GM also attempted to impose the costly, but useless, GM-instituted Kroll investigation against Mr. Adkins' interest in the dealership. When presented with GM's intention in this regard, Mr. Adkins objected, particularly in light of the fact that GM's Kroll investigation had failed to provide sufficient information for the dealership to recover under its insurance policy. A-604; A-750-751; A-756. Ordinarily, the issue of the responsibility for the payment of GM's Kroll investigation might have been "footnoted" by the accountant as a disputed item, so that the dispute would not impede the completion of the annual audit. A-751. GM's board members learned that the dealership's accountant, at the time, Satty & Levine, steadfastly refused to footnote the item without backup documentation from Kroll. A-752. When Mr. Adkins asked Mr. Rinke to forward the Kroll invoices and other backup documentation to Satty & Levine, Mr. Rinke withheld the backup documents. A-604.

### C. GM's Pretextual Termination of Mr. Adkins' Interest in Palanker

In March 2003, the GM-appointed directors demanded that Mr. Adkins submit an audit within 90 days, knowing full well that doing so would not be possible given the footnoting standoff that the GM board member operatives had engendered. A-752-753; A-759-760. In light of the circumstances created by GM, the only thing that was possible under the circumstances was a "draft" audit for 2000. Furthermore, the lack of a certified 2000 audit, in turn, forced the 2001 and 2002 annual statements also to be prepared in "draft only" status. A-605; A-849-850. The GM board members responded by refusing to certify anything but an official finalized audit. A-850. While obtaining what it wanted was within GM's own control, GM offered Mr. Adkins no justification or explanation why a closely-held corporation that had only two shareholders and no outside lenders would demand such formality. GM could have replaced Satty & Levine with another accounting firm that would footnote the item as a disputed issue, as is customary. A-753.

Moreover, under the dealership's by-laws, either Mr. Rinke or Mr. Fields individually possessed the authority to secure his own audit from another accounting firm at any time. A-761-762. Nevertheless, GM utilized this very "problem" – a "problem" that it had itself created to oust Mr. Adkins – ostensibly on the basis that he had "failed to submit year-end certified financial statements for the Dealer Company for the years 2000, 2001, and 2002." A-2011. Tellingly, shortly after unilaterally terminating Mr. Adkins' interest in the dealership, the dealership did replace Satty & Levine, and GM paid $300,000 to cover the disputed Kroll bill. A-753. The pretext that GM employed to

terminate Mr. Adkins is further exposed by the fact that GM maintained unlimited and direct access to all of Palanker's financial records and outside professionals including Satty & Levine and Kroll. Moreover, for Mr. Adkins, GM's improper motivations were completely unveiled when shortly after GM terminated him and his shares were confiscated, the GM-controlled board committed an about-face and filed a lawsuit against Lipner Gordon seeking the recovery of $2 million in damages. A-725.

### D. Proceedings Before the United States District Court

Petitioner Mr. Adkins filed the underlying lawsuit against Respondent GM in the Supreme Court of the State of New York, County of Nassau. GM removed this case to the United States District Court for the Eastern District of New York on the basis of federal question jurisdiction pursuant to the provisions of 28 U.S.C. §§1441 (a) and (b). Mr. Adkins' Verified Complaint contained a single cause of action grounded in federal law, Automobile Dealer's Day in Court Act, 15 U.S.C. §1221 *et seq.* ("ADDCA"). SCA-40-47.

The federal district court entered a number of pretrial rulings that disposed of all but one of Mr. Adkins' claims. Among these rulings was the court's dismissal of Mr. Adkins' one federal claim brought pursuant to the ADDCA, 15 U.S.C. §1221 *et seq.*, months in advance of trial. SCA-34-36. The district court eventually permitted this case to be tried on a single claim for the GM Defendants' breaches of fiduciary duty under Delaware Law. The federal district court never analyzed the requisite criteria for continuing to exercise jurisdiction following the dismissal of the one federal claim.

The jury heard argument and evidence over the course of a three-week trial and concluded on August 27, 2004 that the GM Defendants had breached fiduciary duties owed to Mr. Adkins, depriving him of sole and exclusive ownership of the Palanker dealership, and awarding him damages totaling $2.39 million. A final judgment in Mr. Adkins' favor was entered. SCA-20-26. Thereafter, on September 15, 2004, GM filed a renewed motion for judgment as a matter of law, which the district court denied on March 30, 2005. SCA-8-19.

### E. Proceedings Before the United States Court of Appeals for the Second Circuit

GM filed its Notice of Appeal on April 27, 2005, and Mr. Adkins filed his Notice of Cross-Appeal on May 10, 2005. The issues raised for review before the United States Court of Appeals for the Second Circuit were fully briefed.

In an opinion issued on March 3, 2006, the Court of Appeals overturned the jury verdict rendered in favor of Mr. Adkins. SCA-1-7. The ruling also affirmed the district court's dismissal of Mr. Adkins' claim under the ADDCA, but on grounds that were wholly different than that upon which the district court rested its decision. SCA-1.

Thereafter, Mr. Adkins petitioned the Second Circuit for panel rehearing and rehearing *en banc*.[3] On May 25, 2006, the Second Circuit issued an order denying the

[3] Upon application by the Petitioner, the time for filing a motion for panel rehearing and rehearing *en banc* was extended until April 7, 2006, the date on which the petition for rehearing was filed.

application for panel rehearing and rehearing *en banc*. SCA-38-39. The decision of the Second Circuit was erroneous on multiple levels and in conflict with decisions of other circuits. For these compelling reasons, this Petition should be granted.

## REASONS FOR GRANTING THE WRIT

### I. CONTRARY TO ESTABLISHED FEDERAL PRECEDENT, THE COURT OF APPEALS IMPROPERLY EXERCISED SUBJECT MATTER JURISDICTION IN THIS CASE WHERE THE SINGLE FEDERAL CLAIM, UPON WHICH JURISDICTION WAS ORIGINALLY PREMISED, HAD BEEN DISMISSED BEFORE TRIAL IN THE DISTRICT COURT.

The federal courts lacked subject matter jurisdiction following dismissal of the one federal claim brought by Mr. Adkins. For this reason, the Second Circuit's disposition on appeal constituted an error of law that contravenes established precedent of the United States Supreme Court and the courts of appeals.

"Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto . . . For that reason, every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). The circuit courts of appeals have widely heeded the limitations on their federal judicial authority: "Federal courts are courts of limited jurisdiction; they are empowered to hear only

those cases authorized and defined in the Constitution which have been entrusted to them under a jurisdictional grant by Congress." *Henry v. Office of Thrift Supervision*, 43 F.3d 507, 511 (10th Cir. 1994).

United States Supreme Court precedent, echoed throughout the federal appeals courts, mandates that, "[I]f the federal claims are dismissed before trial . . . the state claims should be dismissed [in favor of state court review] as well." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Honoring the Supreme Court precedent before it, the Fifth Circuit has advised that "Our general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed." *Parker & Parsley Petroleum Co. v. Dresser Industries*, 972 F.2d 580, 585 (5th Cir. 1992).[4]

While the enactment governing supplemental jurisdiction, 28 U.S.C. §1367, does not mandate dismissal of pendent state-law claims in all circumstances, the general rule that must be followed is:

> [I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the

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[4] Indeed, at oral argument on January 23, 2006, a member of the panel inquired about the absence of subject matter jurisdiction in the federal district court following the district court's dismissal of the lone federal claim brought under the ADDCA, 15 U.S.C. §1221, *et seq*. SCA-40-47.

> state claims may be dismissed without prejudice and left for resolution to state tribunals.

*Gibbs*, 383 U.S. at 726-727.

Special emphasis is placed on principles of comity in the consideration of whether a federal court has properly maintained an exercise of pendent jurisdiction. "Needless decisions of state law should be avoided [by federal courts] both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Gibbs*, 383 U.S. at 726.

While this case was originally commenced in New York state court, General Motors removed the case to federal court, citing federal question jurisdiction. Included within Mr. Adkins' complaint was one federal claim that raised General Motors' violation of the ADDCA, 15 U.S.C. §1221, *et seq*. SCA-34-36. In an order dated June 16, 2004, the federal district court granted dismissal of Mr. Adkins' ADDCA claim, the lone count grounded in federal law in the case. A-330-341.

Left remaining for the jury's consideration at trial during August 2004, was one count for breach of fiduciary duty under Delaware law, which has expressly authorized breach of fiduciary duty claims irrespective of the existence of any contractual agreement between the parties. Thus, "in the usual case, in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 n. 7 (1988); see also *Parker*, 972 F.2d 580 at 586-87.

This Court has stressed the necessity of thoroughly evaluating the propriety of a continued exercise of jurisdiction at every stage of litigation: "Under *Gibbs*, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims." *Carnegie-Mellon*, 484 U.S. at 350. Despite the clear legal prescriptions and the dismissal of the single federal claim well in advance of the trial, neither the federal district court nor the Second Circuit engaged in the requisite analysis of the factors required to be considered in order to decide whether to decline an exercise of subject matter jurisdiction following the dismissal of all federal claims. Although consideration and application of the relevant factors by both courts was mandatory under the law as expressed by this Court, at no time did it occur. Following dismissal of the Petitioner's sole federal claim, the exercise of jurisdiction by the federal courts, particularly in the absence of any consideration or analysis of the aforementioned requisite factors, was manifestly erroneous.

Finally, it is fundamental that, unlike most all other legal issues, subject matter jurisdiction may not be waived and may be raised at any time, even after trial or on appeal. *4:20 Communications Inc. v. The Paradigm Company*, 336 F.3d 775, 778 (8th Cir. 2003) ("As parties may not expand the limited jurisdiction of the federal courts by waiver or consent, subject matter jurisdiction issues may be first raised at any time, even on appeal."); *In re: Minnesota Mutual Life Insurance Company*, 346 F.3d 830, 834 (8th Cir. 2003); *F.A.C., Inc. v. Cooperativa De Seguros De Vida De Puerto Rico*, 449 F.3d 185, 189 (1st Cir. 2006).

In the instant matter, the absence of subject matter jurisdiction in the federal courts was both mentioned by a member of the Second Circuit panel at oral argument and was brought to the attention of the Court of Appeals on petition for rehearing, but there was never any analysis of the relevant criteria, which, upon consideration, would have counseled in favor of disposition by the state court because the one cause of action left for trial in this matter concerned discrete issues of Delaware state law. "'Lack of jurisdiction of a federal trial court touching the subject matter of litigation cannot be waived by the parties or ignored by a federal appellate court.'" *Jader v. Principal Mutual Life Insurance*, 925 F.2d 1075, 1077 (8th Cir. 1991), quoting *Kern v. Standard Oil Co.*, 228 F.2d 699, 701 (8th Cir. 1956).

The Second Circuit's disposition in this matter conflicted with established legal precedent of the United States Supreme Court, that of other circuit appeals courts, and other previous decisions within the Second Circuit itself. *Gibbs*, 383 U.S. at 726. Neither the Second Circuit Court of Appeals nor the federal district court below was vested with subject matter jurisdiction in this matter following the pretrial dismissal of the one federal claim raised in this case. Because the remaining state claims concerned Delaware law exclusively, this case should have been remanded to the state court of New York, where it was originally instituted. The Second Circuit's disposition in this matter occurred in the absence of subject matter jurisdiction, thus violating a core principle of federalism. In order to ensure consistency in the exercise of subject matter jurisdiction, this Petition should be granted.

## II. THE COURT OF APPEALS' AFFIRMATION OF THE DISTRICT COURT'S DISMISSAL OF MR. ADKINS' ADDCA CLAIM ON NEW GROUNDS NOT PREVIOUSLY CONSIDERED BY THE LOWER COURT CONSTITUTED AN ERROR OF LAW AND CREATED CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

On cross-appeal, Mr. Adkins challenged the district's court's improper dismissal of Mr. Adkins' federal statutory claim under the ADDCA, 15 U.S.C. §1221 *et seq.*, upon which jurisdiction in the federal district court was originally premised when GM removed this matter from New York state court. On appeal, Mr. Adkins presented compelling legal authorities that exposed as clearly erroneous the federal district court's conclusion that Mr. Adkins – the dealer principal, franchisee, and future owner of the dealership – lacked standing to pursue claims against GM as an "automobile dealer" under the ADDCA.

In light of the compelling legal authorities conferring standing upon Mr. Adkins to invoke the protections of the ADDCA, the Second Circuit circumvented a challenge to the district court's decision on standing: "We need not reach the question of whether Adkins had standing to bring this claim as an individual operator of dealership . . . " *Adkins v. GM*, 170 Fed.Appx. 184, 188 (2d Cir. 2006). Avoiding the legal realities that unquestionably convey standing upon dealer principals like Mr. Adkins, the Second Circuit determined that even if Mr. Adkins had standing, he had failed to establish a basis for relief under the ADDCA. The Second Circuit's decision in this regard is both factually and legally erroneous and creates a conflict among the circuits.

As background, the district court erroneously determined that Mr. Adkins, the dealer principal, franchisee,

and future owner of the dealership, lacked standing to pursue claims against GM as an "automobile dealer" under the ADDCA. The court's grant of summary judgment in the GM Defendants' favor was based upon an erroneous legal interpretation of the ADDCA and amounted to a Rule 12(b)(6), Fed. R. Civ. P. dismissal of Mr. Adkins' rights under that enactment, and thus, the Second Circuit was required to engage in the most rigorous scrutiny of that decision, but did not do so. *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229, 249-250 (1989). Rather, as referenced above, the Second Circuit avoided the standing issue altogether.

Rather than address the issue of standing directly raised on appeal, the Second Circuit opined that Mr. Adkins failed to state a claim under the ADDCA, relying exclusively upon its decision in *Empire Volkswagen v. World-Wide Volkswagen Corp.*, 814 F.2d 90 (2d Cir. 1987). Employing scant analysis in its decision, the Second Circuit quoted *Empire*:

> In order to succeed on a Dealers' Act [ADDCA] claim, the dealer must demonstrate that the manufacturer exercised coercion or intimidation or made threats against the dealer . . . To achieve an improper or wrongful objective . . . Failure to act in good faith under the Dealers' Act can be found only where there is evidence of a wrongful demand enforced by threats of coercion or intimidation.

*Adkins*, 170 Fed.Appx. at 188, quoting *Empire*, 814 F.2d at 95-96.

From this recital, the Second Circuit pronounces that "Adkins has not alleged any wrongful demands, enforced by threats of coercion or intimidation, on GM's part." The

Court goes on to conclude that a breach of contract claim is the exclusive remedy available to Mr. Adkins. The Second Circuit's deduction in this regard is not only factually inaccurate, its legal reasoning engenders conflicts with other circuit courts of appeals. In fact, Mr. Adkins had alleged numerous instances of wrongful, coercive conduct and intimidation on the part of GM, which were used collectively as the foundation for GM's pretextual termination of Mr. Adkins and the elimination of his right to achieve outright ownership of the Palanker dealership.

Wrongful termination is precisely the type of manufacturer misconduct for which the ADDCA was enacted, and has been held repeatedly and throughout the spectrum of circuit appeals courts as sufficient grounds warranting a claim under the ADDCA. The statute itself expressly authorizes claims against manufacturers who fail to "act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise." 15 U.S.C. §1222. SCA-41; *American Motors Sales Corporation v. Semke*, 384 F.2d 192, 195 (10th Cir. 1967) ("Manufacturer coercion or intimidation or threats thereof is actionable by the dealer where it relates to performing or complying with any of the terms or provisions of the franchise, or where it relates to the termination, cancellation, or nonrenewal of the dealer's franchise."); *Randy's Studebaker Sales, Inc. v. Nissan Motor Corporation in U.S.A.*, 533 F.2d 510, 514-515 (10th Cir. 1976), citing, H.R. Rep. No. 2850, 84th Cong., 2d Sess. (1956), U.S.C.C.A.N. 1956, p. 4596, 4603 (1956). Even "Constructive termination may serve as the basis for a violation of the Act if it is the result of actions taken by a manufacturer with the intent to intimidate, threaten or

coerce." *Imperial Motors, Inc. v. Chrysler Corporation*, 559 F.Supp. 1312, 1315 (D. Mass. 1983).

The Second Circuit's summary rejection of the factual bases for Mr. Adkins' ADDCA claim represented a divergence from the majority of federal court opinions that have deemed the determination of what constitutes "threats" or "coercion" under the ADDCA as necessitating a fact-intensive analysis and a more well-developed record than that which existed here. "'The existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct.'" *American Motors Sales*, 384 F.2d at 196. Further, the "Act is not as concerned with what the parties did as it is concerned with why they did it." *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786, 791-792 (5th Cir. 1971). Gleaning the real motivations behind GM's actions was not an endeavor that was possible on the summary review performed by the Second Circuit, nor was such a decision consistent with other circuit court decisions. "In applying this [good faith] definition, it is necessary for the finder of fact to consider not only whether one party brought pressure to bear on the other, but for what reason it did so." *Rea v. Ford Motor Company*, 497 F.2d 577, 585 (3d Cir. 1974).

Indeed, the federal courts have deemed conduct far less egregious and systematic than that in which GM engaged here as sufficient to warrant the protection of the ADDCA. The record was clear that GM positively refused to permit Mr. Adkins to pursue any remedies to protect his interest in the dealership following revelation of the Gehrlein theft scheme: (1) GM refused to permit a criminal investigation; A-570; A-723-724; A-816; A-86-287; A-573; (2) GM refused

to permit a malpractice action against Lipner Gordon; A-575; A-580; A-724-725; A-796; and (3) GM billed substantial legal and investigative fees against Mr. Adkins' interest in the dealership; A-818.

Ultimately, GM demanded a completed audit from Mr. Adkins with full knowledge that GM's own requisitions and refusals made it impossible for Mr. Adkins to comply. Unlawfully, GM terminated Mr. Adkins on this pretextual basis. A-604; A-751; A-752; A-604; A-752-753; A-759-760; A-605; A-849-850; A-850; A-2011. Further, although the legal authorities interpreting the ADDCA require "proper notice," no such notice was afforded Mr. Adkins. The lack of notice is further indicia of GM's improper motivations here; yet the Second Circuit ignored this fundamental requirement of law. *Frank Meador Buick, Inc. v. General Motors Acceptance Corporation*, 13 B.R. 841, 845 (W.D. Va. 1981).

## III. INDIVIDUAL AUTOMOBILE DEALERS ARE WITHIN THE CLASS OF PERSONS FOR WHOSE PROTECTION THE ADDCA WAS ENACTED, AND THUS, HAVE STANDING TO ASSERT CLAIMS UNDER THE ADDCA. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SUBSTANTIAL EXISTING CONFLICTS AMONG THE CIRCUIT COURTS OF APPEALS.

While the Second Circuit ruled that Mr. Adkins failed to allege the requisite wrongful demands necessary to invoke the ADDCA, the Court conveniently side-stepped the issue upon which the district court had erroneously dismissed Mr. Adkins' ADDCA claim: lack of standing under the ADDCA. SCA-34-36. This Petition should further be granted to resolve widespread confusion within the federal courts about which party has standing to

invoke the protections of the ADDCA. While the Third, Seventh, Eighth, and Fifth Circuits have acknowledged that many individual dealers have standing to sue under the ADDCA, the Second and Eleventh Circuits have delivered decisions that some courts, including the federal district court below, have interpreted to deny standing to individual dealers positioned as Mr. Adkins.

Citing to the Second Circuit's decision in *Vincel v. White Motor Corporation*, 521 F.2d 1113 (2d Cir. 1975), the district court concluded that only the GM-controlled dealership, Palanker, had standing to assert claims under the ADDCA. SCA-34-36. Mr. Adkins contends that ruling is patently incorrect because it presupposes that either no remedy is available to anyone for GM's violations or that the GM-controlled dealership would pursue legal action against GM. Plainly, GM is not going to permit a lawsuit against itself.

Furthermore, the ruling contravenes the unambiguous and plainly articulated Congressional purpose behind the Act: to protect against "abuse by the manufacturers of their dominant position with respect to their dealers." H.R. Rep. No. 2850, 84th Cong., 2d Sess. (1956), U.S.C.C.A.N. 1956, p. 4596, 4596-4597 (1956).[5]

In *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965), the Seventh Circuit validated a dealer

[5] "The ADDCA was enacted by Congress for purpose of preventing manufacturers from using their contractual agreements as tools to eliminate legal recourse to the dealer: The bill [ADDCA] as amended proceeds from the conclusion that in the automobile industry concentration of economic power has increased to the degree that ***traditional contractual concepts are no longer adequate to protect the automobile dealers under their franchises***." H.R. Rep. No. 2850, 84th Cong., 2d Sess. (1956), U.S.C.C.A.N. 1956, p. 4596, 4597-98 (1956) (emphasis added).

principal's right to invoke the protections of the ADDCA. In *Kavanaugh*, the Seventh Circuit held that:

> We are convinced, however, that the corporation should be disregarded in determining the question before us. Notwithstanding the fact that the corporate format may be legally unassailable in other situations, its vulnerability is exposed when the purposes of the Dealers' Day in Court Act and its legislative history are considered.
>
> The Act was prompted by abuses stemming from the disparity in bargaining power between manufacturers and their locally franchised representatives. Its fundamental purpose was "to balance the power now weighted heavily in favor of automobile manufacturers."

*Id.* at 716-717. Decisions from other circuits have embraced the reasoning of *Kavanaugh*. *See, e.g., Rea*, 497 F.2d at 584 (holding that individual plaintiff and principal individual stockholder of the corporate automobile dealership had standing to sue the manufacturer for bad faith); *Lewis v. Chrysler Motors Corporation*, 456 F.2d 605, 606-607 (8th Cir. 1972) (motion to dismiss for lack of standing improper because plaintiff might have produced evidence demonstrating that parties' relationship gave rise to "automobile dealer" status under the ADDCA); *York*, 447 F.2d at 790-791 (individual plaintiffs had standing where they were personally responsible for the dealership's viability and essential to the operation of the dealership); *Empire Volkswagen, Inc. v. World-Wide Volkswagen*, 627 F.Supp. 1202, 1211 (S.D.N.Y.), *aff'd*, 814 F.2d 90 (2d Cir. 1987) (recognizing that an individual has standing under the ADDCA in two circumstances: (1) "when the corporation cannot sue" as in *Kavanaugh*, and (2) "when the franchise agreement was conditioned on the individual

dealer's participation in the dealership" as in *York*); *Imperial Motors*, 559 F.Supp. at 1315.

On the other hand, in addition to the Second Circuit's decision in *Vincel*, decisions from within other circuits have denied standing to individual dealers: *Pearson v. Ford Motor Co.*, 68 F.3d 1301, 1303 (11th Cir. 1995); *Bronx Chrysler Plymouth, Inc. v. Chrysler Corporation*, 212 F.Supp.2d 233, 243-244 (S.D.N.Y. 2002) (purporting to follow *Vincel*). Because the issue of legal standing of the individual dealers to sue to enforce the protections of the ADDCA is an issue that has been so widely litigated across the full spectrum of circuits and there is a clear difference of opinion among them, it is ripe for resolution. For these reasons as well, this Petition should be granted.

## IV. THE COURT OF APPEALS VIOLATED THE PRINCIPLES OF COMITY AND FEDERALISM IN FAILING TO FOLLOW PRECEDENT FROM DELAWARE'S HIGHEST COURT THAT GOVERNS THE ISSUES IN THIS CASE.

While improperly exercising its judicial authority over this matter in face of a complete absence of subject matter jurisdiction, the Second Circuit erroneously ruled in this case that the injury that GM and its board member operatives caused to Mr. Adkins, in terminating his stock position and eliminating his ability to pursue outright ownership of the Palanker dealership, was derivative rather than direct and founded only in contract rather than upon breach of GM's fiduciary duties. In doing so, the Second Circuit overturned Mr. Adkins' jury verdict and the attendant judgment rendered in the federal district court on grounds that were in plain derogation of legal authority from the Delaware Supreme Court and statutory authorities that are directly on point and controlling of the issues

surrounding GM's wrongful termination of Mr. Adkins' rights.

Through the decision in *Erie Railroad Co. v. Tompkins*, this Court established the doctrine that state law as announced by a state's highest court must be followed by federal courts in deciding questions of state law. 304 U.S. 64, 78 (1938). "[A]s was intimated in the *Erie Railroad* case, the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited, or restricted." *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236 (1940). "[T]he underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law." *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465 (1967) ("This is not a diversity case but the same principle may be applied for the same reasons . . . "); *Hortonville Joint School District v. Hortonville Education Association*, 426 U.S. 482, 488 (1976) ("We are, of course, bound to accept the interpretation of Wisconsin law by the highest court of the State."); *Ellis v. Cleveland Municipal School District*, 2006 WL 2041695 *5 (6th Cir. 2006). The Second Circuit's decision represents a departure from this established federal principle.

In this case, Mr. Adkins was the minority shareholder in a close corporation which assured him that upon satisfaction of certain financial targets, he would be absolutely and immediately entitled to become the sole, exclusive owner of Palanker Chevrolet. GM obstructed Mr. Adkins'

rights of exclusive ownership and wrongly confiscated his stock position. Indeed, through his lawsuit, Mr. Adkins sought to vindicate a personal interest that only he possessed: the right to buy out GM and become the exclusive owner of Palanker. No other shareholder possessed this interest or suffered the same injury when GM seized that opportunity from him. Because the right to become the exclusive owner of Palanker was granted only to Mr. Adkins, he alone was the person positioned to sue to vindicate that right. *Kramer v. Western Pacific Industries, Inc.*, 546 A.2d 348, 351 (Del. 1988) (individual action can be based on "an injury which is separate and distinct from other shareholders").

The district court permitted this case to proceed to trial on one count of breach of fiduciary duty. Contrary to the Second Circuit's ruling, the district correctly ruled that Mr. Adkins' injury was personal rather than derivative:

> Specifically, the Plaintiff asserts a claim for breach of fiduciary duty resulting in the loss of his opportunity to gain control over the dealership. If the Plaintiff can prove that the breach of fiduciary duty caused him to lose his investment opportunity, this constitutes a direct claim of harm to him as an individual, separate and distinct from any harm to the dealership.

SCA-34. The jury returned a verdict in favor of Mr. Adkins in the amount of $2.39 million incident to GM's deprivation of Mr. Adkins' rights, and a judgment ratifying the verdict was entered in Mr. Adkins' favor. As the district court below correctly noted, Mr. Adkins shared a "unique relationship" with the Palanker dealership, and was owed

duties by the GM officials that dominated Palanker's affairs. Under prevailing Delaware law, this special relationship gave rise to the fiduciary duties which the jury ultimately concluded GM had violated.

The Second Circuit Court of Appeals' improper reversal of the district court judgment represents a misapplication of the decision in *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), and a wholesale disregard of other Delaware Supreme Court authorities that are on point and controlling here. First, *Tooley* is factually inapposite to Mr. Adkins' circumstances. *Tooley* did not involve a situation like Mr. Adkins' where the minority stockholder was poised to become the outright owner of the business, nor did it involve termination of the stockholder's position amounting to a "stock freeze out." Second, when *Tooley's* two-pronged test for determining whether an injury is direct or derivative is applied to the circumstances presented in Mr. Adkins' case, the existence of a direct injury is manifest. The *Tooley* test requires analysis of "the nature of the wrong and to whom the relief should go." *Tooley*, 845 A.2d at 1039. Mr. Adkins alone lost the right to become the exclusive owner of the dealership, and he is the lone recipient of the relief for GM's wrongful conduct.

In addition to the flawed deductions surrounding its analysis of *Tooley*, the Second Circuit's conclusion that the seizure of Mr. Adkins' equity interest and the elimination of his rights as eventual owner of the Palanker business could be remedied only through a claim for breach of contract rather than breach of fiduciary duty was patently erroneous and directly at odds with both decisions of the Delaware Supreme Court and statutory authorities. The

Delaware Supreme Court has ruled that Delaware authorizes fiduciary duty claims despite the existence of a contract:

> Parfi can maintain an action based on the alleged breaches of the independent set of fiduciary duties that Xcelera owes Mirror Image stockholders even though the claims arise from some or all of the same facts that relate to the transactions that provided the basis for its contract claims. ***Xcelera's fiduciary duties to Mirror Image consist of a set of rights and obligations that are independent of any contract*** . . .

*Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 156-157 (Del. 2002) (emphasis added).

Furthermore, in *Riblet Products Corporation v. Nagy*, 683 A.2d 37, 40 (Del. 1996), while holding that termination of an employment relationship alone is not sufficient to give rise to a claim for breach of fiduciary duty, the Delaware Supreme Court expressly acknowledged that "termination amount[ing] to a wrongful freeze out of his stock interest" may trigger a claim for breach of fiduciary duty. The court in *Riblet* further emphasized: "To be sure, the Majority Stockholders may well owe fiduciary duties to Nagy as a minority stockholder." *Id.* The Delaware Supreme Court also stressed that, "[The Appellee's] contractual rights are separate from his rights as a stockholder." *Id.* See also *Clemmer v. Cullinane*, 815 N.E.2d 651, 652-653 (Mass.App.Ct. 2004) (Applying Delaware law: a minority shareholder states a claim for freezeout against controlling shareholders which terminated his employment, eliminated any further value of his investment, and excluded him from governance of the corporation.).

In both Section VIII of the Stockholder's Agreement, entitled "Agreement Regarding Claims Against General Motors," and Article Eleven of the Certificate of Incorporation, GM purportedly eliminates any meaningful remedies for Adkins, the Operator. A-1373; A-1365. Indeed, for contractual purposes, GM valued Adkins' interest in the dealership at "less than $0." A-2040.

The district court properly concluded with respect to Mr. Adkins' breach of fiduciary claim that under established Delaware law: "shareholders can exculpate directors from liability for breaches of the fiduciary duty of due care, but not from liability for breaches of the duties of good faith and/or fair dealing." A-333-334. Contrary to the Second Circuit's construction, the district court's ruling in this regard is rooted firmly in the foregoing and other Delaware Supreme Court decisions including *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2000), as well as in the Delaware legislative enactment upon which these judicial decisions are premised, Del. Code Ann. Title 8, §102(b)(7). In its decision in *Emerald Partners*, the Delaware Supreme Court expressly noted that:

> The directors of Delaware corporations have a triad of primary fiduciary duties: due care, loyalty, and good faith . . . The purpose of Section 102(b)(7) was to *permit shareholders* . . . to exculpate directors from any personal liability for the payment of monetary damages for breaches of their duty of care, ***but not*** for duty of loyalty violations, good faith violations and certain other conduct."

*Id.* (emphasis added).

The Court of Appeals' reversal of Mr. Adkins' judgment was premised upon a manifest disregard of the state law of

Delaware, plainly contravening decisions of the Delaware Supreme Court and the import of legislative enactments. This Court should reexamine the Second Circuit's ruling to ensure that the principles of comity and federalism are maintained in order that Delaware's state law, as interpreted by Delaware's highest court, is uniformly and consistently construed and applied throughout both state and federal courts.

## CONCLUSION

For the foregoing reasons, this Petition should be granted.

Respectfully submitted,

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170 Fed.Appx. 184

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

**THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 3rd day of March, two thousand six.

Present: HON. ROBERT A. KATZMANN,
HON PETER W. HALL,
*Circuit Judges, and*
HON. EDWARD R. KORMAN,
*District Judge.**

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WILLIAM ADKINS, individually and as a shareholder suing in the right of W. Babylon Chevrolet-Geo, Inc., d/b/a Palanker Chevrolet, a Delaware Corporation,

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* The Honorable Edward R. Korman, Chief Judge, United States District Court for the Eastern District of New York, sitting by designation.

*Plaintiff-Appellee/Cross-Appellant,*
No. 05-2059-cv/05-2308-cv

-v-

GENERAL MOTORS CORPORATION,

*Defendant-Appellant/Cross-Appellee,*

GENERAL MOTORS ACCEPTANCE CORPORATION, TIMOTHY RINKE, PAUL FIELDS, and WEST BABYLON CHEVROLET-GEO, INC.,

*Defendants.*

---

Appearing for William Adkins: KENDALL COFFEY, Coffey & Wright, L.L.P., Miami, FL (Angela Sherill, on *the brief*)

Appearing for General Motors Corporation: DANIEL L. GOLDBERG, Bingham McCutchen LLP, Boston, MA (John R. Skelton, James C. McGrath, Serena D. Madar, T. Peter R. Pound, *on the brief*)

(Filed Mar. 3, 2006)

Appeal from the United States District Court for the Eastern District of New York (Seybert, *J.*).

**ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **VACATED AND REVERSED IN PART, and AFFIRMED IN PART.**

General Motors ("GM") appeals from the judgment below in favor of William Adkins, asking this Court to

vacate the jury verdict in Adkins' favor and to reverse the district court's denial of GM's motion for judgment as a matter of law. We assume the parties' familiarity with the underlying facts and procedural posture of the case.

We conclude that GM should have prevailed on its motion for judgment as a matter of law as to Adkins' breach of fiduciary duty claim, which was the sole claim that went to trial. There was no cognizable theory underlying this claim. To the extent that the claim rested on the theory advanced in Adkins' brief that GM had engaged in self-dealing that harmed the dealership corporation and prevented it from attaining the financial targets that would have enabled the redemption of GM's preferred stock, such that Adkins would have become the sole owner, it was fatally flawed.

First, any such breach of fiduciary duty claim would arguably be derivative rather than direct, given the Delaware Supreme Court's recent holding in *Tooley v. Lewis* that for a breach of fiduciary duty claim to be direct, "[t]he stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that *he or she can prevail without showing an injury to the corporation.*" 845 A.2d 1031, 1038-39 (Del. 2004) (emphasis added). As the district court ruled in its July 12, 2004 order, because Adkins did not maintain an equity interest in the dealership corporation throughout the pendency of the litigation, he lacked standing to bring a derivative claim.

Moreover, even assuming *arguendo* that this claim could somehow have been construed as direct rather than derivative, it would still fail on the merits. There is no

credible evidence indicating that, had GM pursued the criminal or civil actions on the dealership's behalf that Adkins contends were warranted, the dealership's financial situation would have been any different. Indeed, although Adkins identifies, as a wrongful action, GM's decision not to file a criminal complaint over Gehrlein's misconduct, the record is undisputed that a criminal investigation was instituted nonetheless, and the attorney who litigated the dealership's insurance claim testified that the lack of criminal charges against Gehrlein had no effect on that litigation.[1] Similarly, although Adkins also identifies as wrongful GM's initial refusal to file a malpractice lawsuit against the dealership's accounting firm, Adkins simply initiated his own derivative action against that firm, and GM later took over prosecution of the lawsuit. Finally, although Adkins has attempted to argue that the dealership's financial situation was such that he was actually entitled to buy out GM's preferred shares as of 2001, there is no evidence supporting this view. The only evidence identified by Adkins in support of this argument is an internal document in which GM explored the hypothetical consequences of forgiving the approximately $1.5 million that the dealership owed to GM. The document did not reflect the dealership's actual financial situation as of 2001. In sum, therefore, there is no evidence that at any time before December 3, 2003, the

[1] The force of this testimony and other evidence to the same effect is not undermined by the fact that, when a GM-designated member of the dealership board was asked at trial whether he had understood "one of the requirements to make a successful claim against a fiduciary bond is at least you try to prosecute the wrongdoers," he answered "[t]hat's correct." As made clear by the testimony of the attorney who actually litigated the insurance claim, the insurance company itself did not take such a position.

dealership's finances were such that Adkins could have obtained sole ownership, nor that the dealership's finances would have been in such condition absent the conduct on GM's part that Adkins deems wrongful.[2]

To the extent that Adkins' breach of fiduciary duty claim against GM rested upon the theory that GM had wrongfully bought out his common stock on a pretextual basis, and otherwise treated him unfairly, it was likewise fatally flawed. Adkins' remedy for these asserted wrongs lay not in a breach of fiduciary duty claim, but in a breach of contract claim. The Stockholders Agreement, along with the Certificate of Incorporation that it referenced, set forth the terms of the relationship among GM, Adkins, and the dealership company, including the conditions upon which the dealership corporation would be able to redeem GM's preferred stock and, conversely, upon which GM would be able to buy out Adkins' common stock or terminate Adkins. Had Adkins believed that GM breached the express terms of this contract, and/or the implied covenant of good faith and fair dealing underlying the contract, he should have brought a breach of contract claim. *See, e.g., Coleman v. Taub*, 638 F.2d 628, 636 (3d Cir. 1981) (stating, in case involving Delaware law, that "where all shares of the corporation are owned by only two shareholders and the public is not affected, there is no reason why an appeal to

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[2] The foregoing makes it unnecessary to reach the issue of whether – in addition to showing that GM's actions prevented him from obtaining sole control of the dealership corporation – Adkins would have also been required to show that GM acted as it did "for the sole and improper purpose" of depriving him of his asserted right as a shareholder to obtain ownership of the corporation. *See Ueltzhoffer v. Fox Fire Dev. Co.*, 1991 WL 271584, at *8 (Del. Ch. 1991), *aff'd*, 618 A.2d 90 (Del. Super. Ct. 1992).

general fiduciary law should be used by either party as a pretext for evading his contractual obligations"). Adkins did not attempt to bring a breach of contract claim, however, until after the deadline for filing amended pleadings had passed. The district court therefore denied his motion to amend his complaint, and Adkins has not appealed that denial.

As such, we are constrained to vacate the jury verdict in favor of Adkins on his breach of fiduciary duty claim and to reverse the district court's denial of GM's motion for judgment as a matter of law. We therefore remand the case to the district court with instructions to grant the motion.

With regard to Adkins' cross-appeal over the summary judgment dismissal of his claim under the Automobile Dealers Day in Court Act (the "ADDCA"), we affirm. We need not reach the question of whether Adkins had standing to bring this claim as an individual operator of a dealership, or whether the only party with standing to bring this claim was the dealership corporation itself. Even assuming *arguendo* that Adkins did have standing to bring the claim, this Court held in *Empire Volkswagen v. World-Wide Volkswagen Corp.*, 814 F.2d 90 (2d Cir. 1987) that:

> In order to succeed on a Dealers' Act claim, the dealer must demonstrate that the manufacturer exercised coercion or intimidation or made threats against the dealer . . . to achieve an improper or wrongful objective . . . Failure to act in good faith under the Dealers' Act can be found only where there is evidence of a wrongful

> demand enforced by threats of coercion or intimidation.

*Id.* at 95-96 (internal citations and quotations omitted).

Here, Adkins has not alleged any wrongful demands, enforced by threats of coercion or intimidation, on GM's part. Rather, the "wrongful" actions that he identifies are GM's various decisions as to the dealership corporation as a whole, and as to him personally, *i.e.*, GM's purchase of Adkins' common stock and concomitant termination of him as president. But none of these acts can be said to have been "enforced by threats of coercion or intimidation." GM's decisions as to the dealership corporation as a whole were enforced through its majority voting interest, and GM's decisions as to Adkins personally were enforced pursuant to the terms of the Stockholders Agreement, which Adkins does not claim was breached. Thus, Adkins' ADDCA claim must fail, and we affirm the district court's summary judgment dismissal of this claim.

Accordingly, the judgment of the district court is **VACATED AND REVERSED IN PART, and AFFIRMED IN PART.**

FOR THE COURT:
ROSEANN B. MacKECHNIE,
CLERK

By: /s/ Lucille Carr

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - - - - - - X

WILLIAM ADKINS, individually and as a shareholder suing in the right of W. BABYLON CHEVROLET-GEO, INC., D/B/A/ PALANKER CHEVROLET, a Delaware corporation,

Plaintiffs,

03-CV-3613 (JS)

-against-

MEMORANDUM AND ORDER

GENERAL MOTORS CORPORATION, GENERAL MOTORS ACCEPTANCE CORPORATION, TIMOTHY RINKE, and PAUL FIELDS,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - - X

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For Defendants

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SEYBERT, District Judge:

After a three-week trial, the jury returned a verdict of $2.39 million in favor of Plaintiff William Adkins against Defendant General Motors Corporation ("GM"). Specifically, the jury found that GM breached a fiduciary duty owed to Plaintiff, and proximately caused Plaintiff $390,000.00 in damages attributable to lost profits, and $2 million in damages attributable to future lost profits. Pending before the Court is Defendant GM's renewed motion for Judgment as a Matter of Law ("JMOL"). For the reasons set forth herein, GM's motion is DENIED.

## BACKGROUND

On October 24, 1994, Plaintiff entered into a stockholder's agreement ("Agreement") with West Babylon Chevrolet Geo and General Motors. Pursuant to the agreement, Plaintiff became the minority shareholder and operator of an automobile dealership, with GM as the majority shareholder.

If all went according to plan, Plaintiff would be able to acquire sole ownership of the dealership through periodic buyouts of GM's stock. The profits generated by the dealership would fund the redemption of GM's stock. Until Plaintiff had purchased all of GM's stock, however, GM retained seventy-five percent control over the dealership's Board of Directors. The dealership's Board was comprised of Plaintiff and Defendants Paul Fields and Timothy Rinke, who were both appointed by GM.

Plaintiff claims that he was successfully amassing the necessary funds to acquire sole ownership of the dealership, when, in 1999, irregularities in the accounting and bookkeeping of the dealership surfaced. It was eventually

determined that an employee of the dealership, Mary Gehrlein, had wrongfully been diverting funds from the dealership.

Plaintiff and the other Board Members disagreed concerning the appropriate response to the discovery of Gehrlein's fraud. A variety of disputes arose, and, in December 2003, GM terminated its relationship with Plaintiff. Plaintiff claimed that the Defendants' actions and inactions following the discovery of the dealership's problems, up to and including his termination, handicapped his ability to attain sole ownership of the dealership. According to Plaintiff, Defendants' conduct amounted to a breach of fiduciary duty causing direct injury to himself as a minority shareholder.

Based on an instruction agreed upon by all Parties, the jury was informed as to the respective duties and the bases of liability with respect to each of the Defendants. The jury returned a verdict finding that both Defendants Fields and Rinke breached their duty of loyalty and that GM "committed one or more breaches of its fiduciary duties, sufficient to overcome the presumption created by the Business Judgment Rule." The jury found that Fields and Rinke did not cause Plaintiff any damages, but found that GM caused Plaintiff $2.39 million in damages due to lost profits and lost future profits.

## DISCUSSION

### I. Renewed Motion For Judgment As A Matter Of Law

A party is entitled to judgment as a matter of law where "there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue." Fed. R. Civ. P. 50. In assessing a motion for JMOL, the Court must

draw all reasonable inferences in favor of the non-moving party, and make no assessment as to the credibility of witnesses, or weight of the evidence. *Lytle v. Household Mfg. Inc.* , 494 U.S. 545, 554-555, 110 S. Ct. 1331, 108 L. Ed. 2d. 504 (1990); *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970). Accordingly, the Court may not substitute its own judgment for that of the jury. The Court may only grant GM's JMOL motion if "there is 'such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture.'" *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 429 (2d. Cir. 1995) (quoting from *Song v. Ives Lab., Inc.*, 957 F.2d 1041, 1046 (2d. Cir. 1992)). As is apparent, GM bears a "heavy burden" in prevailing on its motion for JMOL. *Stubbs v. Dudley*, 849 F.2d 83, 85 (2d. Cir. 1988).

II. GM's Objections

GM cites three bases for its JMOL motion. First, GM contends that the testimony of Plaintiff's damages expert, Ernest Tyler, was not reliable and did not provide a sufficient basis for the jury's damages finding. Second, GM contends that Plaintiff failed to offer any evidence at trial that GM's alleged breach of fiduciary duty proximately caused Plaintiff's damages. Third, and finally, GM contends that, based on the jury's findings, "the only conceivable basis" for the jury's award was Adkins' termination, which was not a cognizable claim "in light of the waiver of . . . wrongful termination or breach of contract [claims] and the limited scope of the fiduciary duty claim." (Def.'s Mem. of Law at 2.) The Court first addresses GM's second and third arguments.

A. GM's Second And Third Grounds For JMOL

The sum and substance of GM's second and third arguments is that Plaintiff's discharge is the only manner by which GM could have caused Plaintiff's injury. GM argues that Plaintiff cannot recover on this basis because "[he] did not proffer any evidence supporting [a lost investment recovery] that was independent of a wrongful termination or breach of contract claim." (Def.s' Mem. of Law at 18.) Moreover, GM argues that no reasonable jury could have concluded that the decision to terminate Adkins was not protected by the business judgment rule. (Id. ___ 19.) The Court is not persuaded. Even assuming, as GM does, "that the only basis for the Jury to have found liability on the part of GM is that somehow the decision in December 2003 to terminate Adkins was itself a breach of fiduciary duty," (Def.'s Mem. of Law at 18), there is no reason to disturb the jury's verdict.

Prior to trial, there was substantial motion practice in this case concerning the nature of Plaintiff's claims and the permissible legal theories of recovery. Specifically, there was significant disagreement with respect to the scope of Plaintiff's fiduciary duty claims. In a July 13, 2004 Order ("July 13 Order"), the Court stated:

> The Plaintiff will not be permitted to try claims for wrongful termination. . . . However, the Plaintiff will not be precluded from asserting, and attempting to prove at trial, that the GM Defendants' decision to terminate his employment constituted a breach of their fiduciary duties of good faith or fair dealing.

July 13 Order at 4. This Order incorporated the reasoning contained in the Court's April 23, 2004 Order ("April Order"), which found that "[Plaintiff] states a separate

claim for harm to himself. Specifically, the Plaintiff asserts a claim for breach of fiduciary duty resulting in the loss of his opportunity to gain control over the dealership." April Order at 8. The Court's April Order relied on the reasoning set forth in *Tooley v. Donaldson Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).

The Court further addressed the nature of the fiduciary duty implicated by Plaintiff's claims in an Order, dated July 30, 2004 ("July 30 Order"). Specifically, the Court rejected GM's assertion that Plaintiff's claims concerning termination had to be derivative of a harm caused to the company. The Court explained that:

> if the Plaintiff can prove that, in taking any of the challenged actions, including the termination of Plaintiff's employment, the Defendants breached a fiduciary duty owed to the Plaintiff, and that the breach of fiduciary duty resulted in direct harm to the Plaintiff, such as the loss of his investment opportunity, he will have proven his claim and will be entitled to damages. . . . The Court is mindful of the precedent that . . . the termination of an employment relationship does not implicate a fiduciary duty, even where the employee is also a shareholder. However, in this case, the termination of the Plaintiff's employment was not solely an employment decision, it also triggered the Defendants' exercise of their option to purchase the Plaintiff's stock, thereby putting an end to the Plaintiff's investment in the dealership corporation. . . . [G]iven the Plaintiff's unique relationship with the dealership corporation, and because the Plaintiff's termination was inextricably linked to the Defendants' option to purchase his stock, the Court finds that

> [Plaintiff is not foreclosed from pursuing his fiduciary duty claims]"

July 30 Order at 3-4.

Thus, the jury was free to determine that GM's termination of Plaintiff, alone, constituted a breach of fiduciary duty owed by GM to Plaintiff. Indeed, GM's JMOL argument is simply a repackaged version of the same issue raised and decided by this Court on three prior occasions.

Additionally, GM's reliance on the business judgment rule is entirely unavailing. First, prior to deliberation, the jury was specifically instructed on the contours of the business judgment rule. Further, Plaintiff marshaled a case espousing the theory that GM acted in bad faith, and not in the best interests of the dealership. Plaintiff provided evidence that GM had its own, untoward agenda in responding to the 1999 fraud. Plaintiff provided evidence indicating that Plaintiff's desire to go after assets that might have been recoverable by the dealership were handicapped by GM in an effort to undermine Adkins' effort to attain ownership of the franchise. Finally, Plaintiff offered evidence indicating that he was successful at his job, and that he was removed from his position by GM for a pre-textual reason, in order to freeze him out of the dealership. Whether or not GM's reason for terminating Plaintiff was proper or pretext was for the jury to decide. A motion for JMOL does not provide a litigant, dissatisfied with the jury's determination, with the right to try a case before the Court instead.

B. Plaintiff's Damages Expert

Prior to trial, GM filed an *in limine* motion, seeking to exclude the testimony of Plaintiff's damages expert, Ernest Tyler ("Tyler"). On August 5, 2004, this Court entered an Order, finding Tyler's testimony admissible. Here, GM raises several of the same grounds that were raised in the *in limine* motion, contending that Tyler's testimony should have been excluded, and the jury verdict thrown out. GM does not challenge Tyler's methodology, but challenges the factual predicate of his expert opinion.

1. Standard Of Review

Under *Daubert*, district courts have assumed a "gate-keeping" role with respect to the admissibility of expert testimony, and must ensure that an expert's testimony, *inter alia* "rests on a reliable foundation, and is relevant to the task at hand". *Daubert v. Merrell Dow Pharm., Inc*, 509 U.S. 579, 588, 113 S. Ct. 2786, 125 L. Ed. 2d. 469 (1993). In determining whether a reliable foundation exists, the Court must consider the "indicia of reliability" of expert testimony, meaning "that the testimony is grounded on sufficient facts or data." *Amorgianos v. National R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d. Cir. 2002). Broad discretion is granted for the Court "to determine whether the expert acted reasonably in making assumptions of fact upon which he would base his testimony." *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d. Cir. 1996). Guiding this inquiry, district courts must "make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Id.* at 266 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d. 238 (1999)).

2. Tyler's Testimony

In proffering his damages estimation, Tyler assumed that Plaintiff would have bought out GM and attained sole ownership of the dealership by the end of 2003. In order for this event to occur, the dealership would have to attain a net worth of $2 million.[1] (Tr. 2018, 2022-23.) In determining that the dealership would reach this plateau, Tyler relied on, *inter alia*, a "snapshot" of the dealership provided by an internal accounting review from October 2003 that stated the dealership had a net worth of approximately $1.4 million, (Tr. 2008, 2017), and anticipated recoveries from pending insurance and malpractice litigation. (Tr. 2023-24.)

GM contends that Tyler's testimony must be excluded as unreliable because: (1) he failed to take into account a $1.4 million tax liability owed by the dealership to the state of New York (Tr. 2009); and (2) he improperly included a $2 million projected litigation recovery figure in assessing that the dealership would reach the $2 million plateau.[2] According to GM, when appropriate adjustments

[1] The Court recognizes that the Parties disagreed at various instances during the trial as to the net worth the dealership would have to attain so that Plaintiff would be able to purchase GM's ownership interest. However, Tyler's expert opinion relied on a $2 million "trigger" value, and that is the value the Court will consider in assessing the competency of his opinion.

[2] GM also objects to Tyler's testimony concerning the dealership's shortage of working capital and its impact upon future profit projections. GM maintains that Tyler's future profit projections are without merit because the financial materials reviewed by Tyler indicate ample working capital. Tyler was cross-examined on this subject and provided an explanation why the working capital numbers were not as large as they appeared to be on paper. The jury was free to accept or reject this explanation. The Court does not find any basis to exclude Tyler's testimony on this ground.

(based on the aforementioned alleged deficiencies) are made to the dealership's net worth, it would have been impossible for Plaintiff to attain the necessary $2 million to acquire sole ownership of the dealership by the end of 2003. (*see* Tr. 2012-13, 2026.) This would render the remainder of Tyler's projections meaningless, and leave the jury to impermissibly speculate with respect to a damages award.

Tyler, however, was confronted extensively about these issues during a lengthy cross-examination. He admitted that he was not aware of the $1.4 million tax liability when he made his estimates, but contended that the $1.4 million tax liability was only under investigation, and would not necessarily impact net worth at the pertinent time. (Tr. 2004-05, 2027.) With respect to the litigation recovery estimates, Tyler was questioned at length concerning their speculative nature. He testified that his figures were conservative, and were not as speculative as they might otherwise seem because they were founded on a concrete figure – the fraud loss to the company. (Tr. 2038.) GM argues that the litigation figures are still impermissibly speculative because they are based on an as yet unknown litigation recovery. *See U.S. v. Carboni*, 204 F.3d 39, 46 (2d Cir. 2000); *United States v. Jaffe*, 314 F. Supp. 2d 216, 227 (S.D.N.Y. 2004) ("the outcome of the civil litigation is speculative and should not affect an order to make restitution"). But Tyler did not testify that Plaintiff was entitled to any portion of the litigation recovery. Rather, Tyler testified concerning the value of the dealership. *See Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole*, No. 00-CV-7620, 2004 WL 725287 at *7 (N.D. Ill. April 1, 2004). While it is an admittedly close question, the Court finds this fact mitigates

concerns that the jury award was impermissibly speculative. GM's cross-examination was sufficient to cure the "shaky" nature of any of Tyler's assumptions. *Daubert* 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence"); *Wechsler v. Hunt Health Sys.*, No. 94-CV-8294, 2003 WL 22358807 at **5-7 (S.D.N.Y. Oct. 16, 2003).

Based on the foregoing, the Court cannot conclude that Tyler's factual predicate was so speculative that his testimony should have been excluded. *See Boucher v. U.S. Suzuki Motor Co., Inc.*, 73 F.3d 18, 21 (2d Cir. 1996) ("expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison, *other contentions go to the weight, not the admissibility, of the testimony*") (emphasis added) (internal citations, quotations omitted).[3]

[3] That the jury resolved a figure that was not in close proximity to Tyler's total damages calculations does not alter the Court's conclusion. Indeed, the jury, arguably, considered GM's extensive cross examination and came up with a figure that they believed to be reasonable based on Tyler's conclusions. *See Tuf Racing Prod., Inc. v. Amer. Suzuki Racing Corp.*, 223 F.3d 585, 591 (7th Cir. 2000) ("if the award is within the bounds of reason, the fact that the jury may not have used reason to arrive at it . . . will not prevent it from being upheld").

## CONCLUSION

For the reasons set forth herein, GM's renewed motion for judgment as a matter of law is DENIED.

SO ORDERED
/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
March 30, 2005

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

----------X

**WILLIAM ADKINS,**

**Plaintiff,**

**-against-**

**GENERAL MOTORS CORPORATION, TIMOTHY RINKE, and PAUL FIELDS,**

**Defendants.**

----------X

**VERDICT FORM**
**03-CV-3613**

***<<< ALL JURORS MUST AGREE ON THE ANSWERS TO ALL QUESTIONS >>>***

SECTION ONE

1. Did the Plaintiff prove, by a preponderance of the evidence, that Timothy Rinke committed one or more breaches of his fiduciary duty of good faith, sufficient to overcome the presumption created by the Business Judgment Rule?

   YES _____ NO ✓

2. Did the Plaintiff prove, by a preponderance of the evidence, that Paul Fields committed one or more breaches of his fiduciary duty of good faith, sufficient to overcome the presumption created by the Business Judgment Rule?

   YES _____ NO ✓

3. Did the Plaintiff prove, by a preponderance of the evidence that Paul Fields and Timothy Rinke, together, committed one or more breaches of their fiduciary duty of loyalty, sufficient to overcome the presumption created by the Business Judgment Rule?

   YES ✓ NO _____

4. Did the Plaintiff prove, by a preponderance of the evidence, that General Motors Corporation committed one or more breaches of its fiduciary duties, sufficient to overcome the presumption created by the Business Judgment Rule?

   YES ✓ NO _____

If you answered **NO** to all of these questions, **DO NOT CONTINUE**, proceed to the last page, sign and date the verdict form and contact Court personnel.

If you answered **YES** to one or more of these questions, please **PROCEED** onto **SECTION TWO**.

SECTION TWO

5. With respect to only those decisions which you have found constitute a breach of duty of loyalty or good faith, sufficient to overcome the presumption created by the Business Judgment Rule, did the Defendant(s) prove, by a preponderance of the evidence, that *all* of those decisions were nonetheless entirely fair?

   YES _____ NO ✓

If you answered **YES, DO NOT CONTINUE**, proceed to the last page, sign and date the verdict form and contact Court personnel.

If you answered **NO**, please **PROCEED** onto **SECTION THREE**.

SECTION THREE

6. With respect to only those decisions which you have answered "NO" to in Questions 5, did the Defendants prove, by a preponderance of the evidence, *all* of those decisions occurred before June 18, 2000?

YES _____ NO ✓

If you answered **YES, DO NOT CONTINUE**, proceed to the last page, sign and date the verdict form and contact Court personnel.

If you answered **NO**, please **PROCEED** onto **QUESTION SEVEN**.

7. With respect to only those decisions which you have answered "NO" to Question 6, did the Defendants prove, by a preponderance of the evidence that the Plaintiff acquiesced or participated in *all* of those decisions?

YES _____ NO ✓

If you answered **YES, DO NOT CONTINUE**, proceed to the last page, sign and date the verdict form and contact Court personnel.

If you answered **NO, PROCEED** onto **QUESTION EIGHT**.

8. With respect to only those decisions to which you answered "NO" in Question 7, did the Defendants prove, by a preponderance of the evidence, that Defendants Timothy Rinke and Paul Fields relied in

good faith on the advice and counsel of competent experts and advisors in making *all* of those decisions?

YES _____ NO ✓

If you answered **YES, DO NOT CONTINUE**, proceed to the last page, sign and date the verdict form and contact Court personnel.

If you answered **NO, PROCEED** onto **QUESTION NINE.**

9. With respect to only those decisions to which you answered "NO" in Question 8, did the Defendants prove, by a preponderance of the evidence, that Plaintiff William Adkins had "unclean hands" with relation to *all* of those decisions?

YES _____ NO ✓

If you answered **YES, DO NOT CONTINUE**, proceed to the last page, sign and date the verdict form and contact Court personnel.

If you answered **NO, PROCEED TO SECTION FOUR.**

SECTION FOUR

10. With respect to only those decisions which you answered "NO" in Question 9, did the Plaintiff prove, by a preponderance of the evidence, that any of those decisions proximately caused direct injury to the Plaintiff?

YES ✓ NO _____

If you answered **NO, DO NOT CONTINUE**, proceed to the last page, sign and date the verdict form and contact Court personnel.

If you answered YES, **PROCEED TO QUESTION ELEVEN**.

11. With respect to only those decisions that you answered "YES" in Question 10, what amount of damages, if any, did Plaintiff prove, by a preponderance of the evidence, were proximately caused directly to him, by the breach of fiduciary duties of loyalty and/or good faith?

    1. PAUL FIELDS

    | | |
    |---|---|
    | Lost Profit | 0 |
    | Future Lost Opportunity for Profit | 0 |

    2. TIMOTHY RINKE

    | | |
    |---|---|
    | Lost Profit | 0 |
    | Future Lost Opportunity for Profit | 0 |

    3. GENERAL MOTORS CORPORATION

    | | |
    |---|---|
    | Lost Profit | 390,000 |
    | Future Lost Opportunity for Profit | 2,000,000 |

12. If you found that any damages were caused by Mr. Rinke and/or Mr. Fields, did the Plaintiff prove, by a preponderance of the evidence, that General motors was vicariously liable for any of those damages?

    YES _____ NO ✓

If you answered **NO, PROCEED** to **QUESTION FOURTEEN**.

If you answered **YES, PROCEED** to **QUESTION THIRTEEN**.

13. What amount of Mr. Rinke's damages do you find General Motors vicariously liable for?

0

What amount of Mr. Fields' damages do you find General Motors vicariously liable for?

0

14. Do you find that the Plaintiff proved, by a preponderance of the evidence, that he is entitled to punitive damages. Please answer yes or no, but **DO NOT** state an amount.

YES _____ NO ✓

**PLEASE HAVE THE JURY FOREPERSON SIGN AND DATE THIS FORM WHERE INDICATED, AND NOTIFY THE COURT.**

Dated: August 27, 2004
Central Islip, New York

/s/ Henry [Illegible]
FOREPERSON

SCA-26

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

---------- X

WILLIAM ADKINS,

Plaintiff

-V-

GENERAL MOTORS CORP., TIMOTHY RINKE, and PAUL FIELDS,

Defendants.

---------- X

JUDGMENT IN A CIVIL CASE
CV 03-3613 (JS)

(Filed Aug. 31, 2004)

__X__ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried, and the jury has rendered its verdict.

____ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff WILLIAM ADKINS recover of the defendant GENERAL MOTORS CORP. the sum of $2,390,000.00. No award is assessed against defendants TIMOTHY RINKE and PAUL FIELDS.

Dated: Central Islip NY
Aug. 31, 2004

ROBERT C. HEINEMANN
Clerk of Court

/s/ Charles J. Baran
By: Charles J. Baran
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------- X

WILLIAM ADKINS, individually and as a shareholder suing in the right of W. BABYLON CHEVROLET-GEO, INC., D/B/A PALANKER CHEVROLET, a Delaware corporation,

Plaintiffs,

-against-

GENERAL MOTORS CORPORATION, GENERAL MOTORS ACCEPTANCE CORPORATION, TIMOTHY RINKE, and PAUL FIELDS,

Defendants.

---------- X

MEMORANDUM AND ORDER
03-CV-3613 (JS) (MLO)

Appearances:

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SEYBERT, District Judge:

Plaintiff William Adkins ("Plaintiff") instituted this action on July 24, 2003. Currently pending before the Court is a motion for summary judgment on behalf of Defendants General Motors Corporation ("GM"), Timothy Rinke ("Rinke") and Paul Fields ("Fields") (collectively the "GM Defendants"). For the reasons set forth below, the motion is GRANTED, in part.

Discussion

A district court may properly grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Under the law of the Second Circuit, a district court must weigh several considerations in evaluating whether to grant summary judgment with respect to a particular claim. *Gallo v. Prudential Residential Servs., L.P.*, 22 F.3d 1219, 1223 (2d Cir. 1994). First, the moving party carries the burden to demonstrate that no genuine issue respecting any material fact exists. *Id.* (*citing Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975)). Second, all ambiguities and inferences must be resolved in favor of the non-moving party. *Gallo*, 22 F.3d 1223 (citing *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 249 (2d Cir. 1985)); *see also Hayes v. New York City Dept. of Corrs.*, 84 F.3d 614, 619 (2d Cir. 1996). Third, the moving party may obtain summary judgment by showing that no rational jury could find in favor of the non-moving party because the evidence to support its case is so slight. *Gallo*, 22 F.3d at 1224 (citing *Dister v. Continental Group,*

*Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988)). Mere conclusory allegations, speculation or conjecture will not avail a party opposing summary judgment. *Kulak v. City of New York*, 88 F.3d 63, 71 (2d Cir. 1996). Finally, the trial court's duty is confined to issue-finding and does not extend to issue resolution. *Gallo*, 22 F.3d at 1223. In evaluating the above considerations, a court must be mindful of whether the purported factual dispute is material, because "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

Count I: Declaratory Judgment

In Count I of the Amended Complaint, the Plaintiff seeks a declaratory judgment stating that the exculpatory clauses contained within the parties' contracts are invalid and unenforceable. The contracts entered into between the parties contain exculpatory clauses which limit the Plaintiff's ability to bring a breach of fiduciary duty suit against the directors of the dealership. Those clauses, if enforceable, will bar the present lawsuit, in part. The Plaintiff seeks to have the Court invalidate those exculpatory clauses, alleging that they are unconscionable and that they violate the New York State Constitution's guarantee of access to courts.

> An unconscionable contract is one that is so grossly unreasonable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms. To establish unconscionability there must be a

> showing of both substantive and procedural unconscionability. Substantive unconscionability requires looking at the substance of the bargain and deciding whether the terms were unreasonably favorable to the party against whom unconscionability is urged. Procedural unconscionability is analyzed by considering a number of factors, including: (1) the size and setting of the transaction; (2) whether deceptive or high pressured tactics were used; (3) the use of fine print; (4) the experience and education of the party claiming unconscionability; and (5) whether there was a disparity in bargaining power.

*Metro. Prop. & Cas. Ins. Co. v. Budd Morgan Cent. Station Alarm Co., Inc.*, 95 F. Supp. 2d 118, 121 (E.D.N.Y. 2000) (internal citations omitted).

There is no indication that the exculpatory clauses are substantively unconscionable. While it is true that the clauses are decidedly favorable to the directors, there has been no showing that the terms are unreasonable. In fact, exculpatory clauses limiting the liability of directors for breaches of fiduciary duty are expressly permitted by Delaware law. Delaware law provides that a corporation's certificate of incorporation may contain

> [a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under §§ 174 of this

> title; or (iv) for any transaction from which the director derived an improper personal benefit.

DEL. CODE ANN. tit. 8, § 102(b)(7). Section 102(b)(7) was enacted to enable shareholders to exculpate directors from personal liability for breaches of certain duties. Pursuant to Section 102(b)(7), shareholders can exculpate directors from liability for breaches of the fiduciary duty of due care, but not from liability for breaches of the duties of good faith and/or fair dealing. *See Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001). As such, the exculpatory clauses in question are in accordance with Delaware law and are not substantively unconscionable.

There is also no indication that the clauses in question are procedurally unconscionable. Although it is true that there was a great disparity in bargaining power between the Plaintiff and the GM Defendants, this alone does not amount to procedural unconscionability. There is no indication that the Plaintiff did not have ample time and opportunity to review the terms of the contracts before signing them. Moreover, the Plaintiff appears to be sophisticated businessman who had years of experience in the industry prior to entering into these contracts. Finally, there is no indication that the exculpatory terms were hidden within the contract or that their meaning was disguised in any way.

The Plaintiff has failed to establish that the exculpatory clauses in the contracts are unconscionable or otherwise invalid. In fact, the Plaintiff offers no argument in opposition to the GM Defendants' motion for summary judgment on this claim. For these reasons, the Court finds that the GM Defendants, are entitled to summary judgment on Count I of the Amended Complaint. The

instant motion is, therefore, GRANTED, with respect to Count I.

Count II: Derivative Claim

Count II of the Amended Complaint states a derivative claim on behalf of the dealership corporation. Although the Plaintiff failed to name the dealership as a necessary party, the Court hereby GRANTS the Plaintiff leave to amend the pleadings to cure this defect. The Amended Complaint is hereby DEEMED AMENDED to name the dealership corporation as a defendant.

To the extent that the Plaintiff intended to assert a derivative claim for breach of the fiduciary duty of due care, that claim is barred by the exculpatory clause contained in Article Eleven of the articles of incorporation. As such, to the extent the derivative claim is based on a claim of breach of the fiduciary duty of due care, the GM Defendants are entitled to judgment as a matter of law and the motion is GRANTED to that limited extent.

The Court hereby reserves decision on the summary judgment motion relating to the derivative claim, to the extent it is based upon an alleged breach of the fiduciary duties of good faith and/or fair dealing and/or statutory duties.

Count III: Breach of Fiduciary and Statutory Duty

Fiduciary Duty

Again, to the extent that the Plaintiff attempts to assert a claim for the breach of the fiduciary duty of due care, the claim is barred by the articles of incorporation. As such, the motion is GRANTED as to the claims

asserted against Rinke and Fields based upon an alleged violation of the fiduciary duty of due care.

As for Defendant GM, as a controlling shareholder who owns a majority interest in the dealership corporation, it owes a fiduciary duty to the dealership corporation. *See Official Committee of the Unsecured Creditors of Color Tile, Inc. v. Investcorp S.A.*, 137 F. Supp. 2d 502, 508 (S.D.N.Y. 2001). However, "Delaware law does not seem to impose a duty of care on controlling shareholders in cases in which there is no breach of the duty of loyalty." *Id.* at 515. Moreover, Plaintiff's allegations against GM are that Rinke and Fields were acting at GM's behest in taking actions on the board. As such, because Rinke and Fields are insulated from liability for those actions by the exculpatory provisions in the articles of incorporation, GM too is insulated from liability. "Enabling plaintiff to sue the shareholder defendant [] for acts of [the board members] for which [the board members] personally cannot be held liable would provide an illogical end-run around the protections of § 102(b)(7)." *Id.* As such, to the extent the Plaintiff attempts to assert a claim against GM for breach of the fiduciary duty of due care, GM is entitled to judgment as a matter of law. Accordingly, the motion is GRANTED as to the claim asserted against GM for breach of the duty of due care.

In order to determine whether a claim asserted by a shareholder against a corporation is properly brought as a direct claim, as opposed to a derivative claim, "a court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she

can prevail without showing an injury to the corporation." *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004). In this case, the Court finds that the Plaintiff has adequately stated a direct action against the GM Defendants for breach of fiduciary duties. Although the Plaintiff does state a derivative claim against the directors for breaching duties owed to the dealership and causing harm to the dealership, he also states a separate claim for harm to himself. Specifically, the Plaintiff asserts a claim for breach of fiduciary duty resulting in the loss of his opportunity to gain control over the dealership. If the Plaintiff can prove that the breach of fiduciary duty caused him to lose his investment opportunity, this constitutes a direct claim of harm to him as an individual, separate and distinct from any harm to the dealership. As such, the Plaintiff has adequately stated a direct claim for breach of fiduciary duty against the GM Defendants.

Statutory Duty

"The Automobile Dealers' Franchise Act, 15 U.S.C. §§ 1221-25, gives 'automobile dealer(s)' a right of action to redress unfair actions committed by a manufacturer in connection with a franchise agreement." *Vincel v. White Motor Corp.*, 521 F.2d 1113, 1119 (2d Cir. 1975). "When, as here, a dealership is doing business in corporate form, the statute contains no hint that it intends a departure from the established principle that the locus of the right of action is the corporation." *Id.* The Plaintiff simply is not an "automobile dealer" within the meaning of the statute and does not have a private right of action under the statute. The statute creates a right of action for the benefit of the dealer corporation.

The Seventh Circuit, in *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965), in deciding a case similar to the facts presented here, held that the individual shareholder had standing to assert a claim under the federal statute. *See id.* at 717. The *Kavanaugh* Court found that, because the manufacturer-defendant was the majority shareholder in the dealership corporation, the manufacturer-defendant would block the dealership corporation from ever seeking the protection afforded by the statute. As such, the *Kavanaugh* Court found that, in order to effectuate the purpose of the statute, the individual shareholder must have standing to assert the claim under the federal statute. It is clear that given the similarity of facts in the present case, if this case were presented in the Seventh Circuit, the holding of *Kavanaugh* would be binding precedent and the Plaintiff would likely be found to have standing. However, this case was brought in the Second Circuit and *Kavanaugh* is not binding precedent. Binding precedent in this Circuit is established in *Vincel*, where the Court held that there was no indication that the federal statute created standing for an individual shareholder. *See also Bronx Chrysler Plymouth, Inc. v. Chrysler Corp.*, 212 F. Supp. 2d 233 (S.D.N.Y. 2002). Although the *Vincel* Court distinguished *Kavanaugh*, it did so merely in dicta and it certainly did not adopt the reasoning or holding of *Kavanaugh*.

Finally, the Court notes that the reasoning presented in *Kavanaugh*, that where the manufacturer-defendant controls the voting stock of the dealership corporation it is "inconceivable" that the dealership would ever assert its rights under the statute, is somewhat compelling. However, this Court finds that the reasoning ultimately fails to support the conclusion that an individual shareholder

should have standing to sue under the statute. Where a corporation fails to assert its legal rights, the traditional remedy for a shareholder is to make a demand of the board and, upon the board's continued failure to assert the corporation's rights, begin a derivative action. There is no indication here that the shareholder has any private right of action under the federal statute or that the traditional mechanism utilized in similar situations, the derivative action, would be insufficient. As such, this Court finds that an individual shareholder has no standing to assert a claim under the Automobile Dealers' Franchise Act. As such, the motion is GRANTED as to the breach of statutory duty claim, to the extent it is alleged as a private action. However, the Court finds that the derivative action stated in Count II is sufficiently broad to state a derivative claim for breach of the statutory duty. The derivative claim is sustained. The Court reserves decision on the summary judgment motion as it relates to the derivative claim.

The analysis presented here applies equally to the claims relating to breach of a duty arising under the state statute. As such, the motion is GRANTED as to the claims relating to the state statutory duty, to the extent it is stated as a private claim, and the Court reserves decision on the derivative claim.

Count V and VI: Fraud and Negligent Misrepresentation

The Court hereby reserves decision on the summary judgment motion related to Counts V and VI.

Conclusion

For the reasons set forth herein, the motion for summary judgment is GRANTED, in part.

The motion is GRANTED as to Count I of the Amended Complaint.

The motion is GRANTED as to the claims arising out of an alleged breach of the fiduciary duty of due care asserted in Counts II and III.

The motion is GRANTED as to the claims arising out of an alleged breach of statutory duties asserted as private rights of action in Count III.

The Court reserves decision on all other aspects of the present motion,

Dated: Central Islip, New York
June 16, 2004

SO ORDERED

/s/ Joanna Seybert
Joanna Seybert, U.S.D.J.

COUNSEL IS DIRECTED TO IMMEDIATELY NOTIFY ALL PARTIES OF THIS ORDER

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**
**THURGOOD MARSHALL U.S. COURT HOUSE**
**40 FOLEY SQUARE**
**NEW YORK 10007**

**Roseann B. MacKechnie**
**CLERK**

Date:

| | |
|---|---|
| Docket Number: | 05-2059-cv |
| Short Title: | Adkins v. General Motors Corporation |
| DC Docket Number: | 03-cv-3613 |
| DC: | EDNY (CENTRAL ISLIP) |
| DC Judge: | Honorable Joanna Seybert |

(Filed May 25, 2006)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 25th day of May two thousand six.

**Adkins v. General Motors 05-2059-cv(L), 05-2308-cv(XAP)**

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee-cross-appellant William Adkins. Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal

and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney

Kendall Coffey Esq.
Coffey & Wright LLP
2665 South Bayshore Drive 2B
Miami, FL 33133

Title 15. Commerce and Trade

Chapter 27. Automobile Dealer Suits Against Manufacturers

**15 U.S.C. § 1221. Definitions**

As used in this chapter –

**(a)** The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

**(b)** The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

**(c)** The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

**(d)** The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided,* That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

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**15 U.S.C. § 1222. Authorization of suits against manufacturers; amount of recovery; defenses**

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956, to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

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**15 U.S.C. § 1223. Limitations**

Any action brought pursuant to this chapter shall be forever barred unless commenced within three years after the cause of action shall have accrued.

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**15 U.S.C. § 1224. Antitrust laws as affected**

No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States.

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**15 U.S.C. § 1225. State laws as affected**

This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not[1] be reconciled.

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**15 U.S.C. § 1226. Motor vehicle franchise contract dispute resolution process**

(a) Election of arbitration

(1) Definitions

For purposes of this subsection –

**(A)** the term "motor vehicle" has the meaning given such term in section 30102(6) of Title 49; and

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[1] So in original. Should be "cannot".

**(B)** the term "motor vehicle franchise contract" means a contract under which a motor vehicle manufacturer, importer, or distributor sells motor vehicles to any other person for resale to an ultimate purchaser and authorizes such other person to repair and service the manufacturer's motor vehicles.

(2) Consent required

Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.

(3) Explanation required

Notwithstanding any other provision of law, whenever arbitration is elected to settle a dispute under a motor vehicle franchise contact, the arbitrator shall provide the parties to such contact with a written explanation of the factual and legal basis for the award.

(b) Application

Subsection (a) of this section shall apply to contracts entered into, amended, altered, modified, renewed, or extended after November 2, 2002.

Current through P.L. 109-268 (excluding P.L. 109-248) approved 08-04-06

N.Y. Vehicle and Traffic Law, ch. 71, tit. IV, art. 17-A (McKinney 1959)

**§ 460. Legislative findings**

The legislature finds and declares that the distribution and sale of motor vehicles within this state vitally affects the general economy of the state and the public interest and the public welfare, and that in order to promote the public interest and the public welfare and in the exercise of its police power, it is necessary to regulate motor vehicle manufacturers, distributors and factory or distributor representatives and to regulate dealers of motor vehicles doing business in this state in order to prevent frauds, impositions and other abuses upon its citizens and to protect and preserve the investments and properties of the citizens of this state.

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**§ 461. Short title**

This article shall be known and may be cited as the "franchised motor vehicle dealer act".

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**§ 463. Unfair business practices by franchisors**

1. It shall be unlawful for any franchisor to directly or indirectly coerce or attempt to coerce any franchised motor vehicle dealer:

* * *

(bb) On and after the effective date of this paragraph, to acquire any interest in any additional motor vehicle dealer in this state, with the exception of stock in a publicly held dealer when ownership is passive and for investment

purposes only; provided, however, that nothing in this paragraph shall prohibit a franchisor and its affiliates that own an interest in a franchised motor vehicle dealership that operates or is approved to operate, within one hundred twenty days after the effective date of this paragraph, from selling or servicing a new line make of the franchisor or its affiliates that was not distributed in this state as of the effective date of this paragraph. Provided, further, that nothing in this paragraph shall prohibit a franchisor from acquiring any interest in any franchised motor vehicle dealership:

(1) when operating such franchised motor vehicle dealership for a temporary period, not to exceed one year, during the transition from one owner of the motor vehicle dealership to another, provided, however, that such temporary period may be extended once for an additional period not to exceed one year for good cause. Provided that for franchisors of house coaches, the period of temporary ownership of a franchised house coach dealership may be extended in one year increments for good cause shown, except that the aggregate of such extensions shall not exceed five years; or

(2) when operating such franchised motor vehicle dealership temporarily under a plan with an independent individual who is obligated to make a significant investment in the dealership that is subject to loss and has an ownership interest or expects to acquire full ownership in a reasonable period under reasonable terms and conditions.

* * *

**8 Del. C. § 102. Contents of certificate of incorporation**

(a) The certificate of incorporation shall set forth:

* * *

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

* * *

(7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer (x) to a member of the governing body of a corporation which is not authorized to issue capital stock, and (y) to such other person or persons, if any, who, pursuant to a provision of the certificate of incorporation in accordance with § 141(a) of this title, exercise or

perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this title.

* * *

H.R. REP. 84-2850, H.R. Rep. No. 2850,
84TH Cong., 2ND Sess. 1956, 1956 U.S.C.C.A.N. 4596,
1956 WL 5114 (Leg.Hist.)

P.L. 84-1026, FRANCHISE AUTOMOBILE DEALERS – SUITS AGAINST MANUFACTURERS
Senate Report No. 84-2073,
May 31, 1956 (To accompany S. 3879)
House Report No. 84-2850,
July 20, 1956 (To accompany S. 3879)
The House Report is set out.

House Report No. 84-2850
July 20, 1956

THE Committee on the Judiciary, to whom was referred the bill (S. 3879) to supplement the antitrust laws of the United States, in order to balance the power now heavily weighted in favor of automobile manufacturers, by enabling franchise automobile dealers to bring suit in the district courts of the United States to recover compensatory damages sustained by reason of the failure of automobile manufacturers to act in good faith in complying with the terms of franchises or in terminating or not renewing franchises with their dealers, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

## PURPOSE OF THE BILL AS AMENDED

The purpose of the bill as amended by the committee is to supplement the antitrust laws of the United States so as to permit a franchised automobile dealer to bring suit for damages, without regard to the amount in controversy, in United States district courts for the failure of the automobile manufacturer to act in good faith in performing or complying with any of the terms or provisions of the

franchise, or in terminating, canceling, or not renewing the dealer's franchise. The bill creates a cause of action where none previously existed in that, irrespective of contractual provisions, it grants a right of review in the Federal courts of disputes between automobile manufactures and their dealers involving the good faith of the manufacturer in complying with, in terminating, or in not renewing the franchises.

In addition to the provisions of the written agreements or contracts between automobile manufacturers and dealers, the bill in its definition of good faith imposes the duty on each party to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party. Unless the transactions between the parties involve coercion or intimidation, or threats of coercion or intimidation, endorsement, exposition, persuasion, urging or argument normal in competitive commercial relationships.

## REASONS FOR BILL

Concentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is required to remedy the manifest disparity in the ability of franchise dealers of automotive vehicles to bargain with their manufacturers. Investigations of the automobile industry, moreover, demonstrate a continuing trend toward greater concentration, as well as abuse by the manufacturers of their dominant position with respect to their dealers. These investigations have disclosed practices and conditions which require new legislative methods and a change in

established concepts. The bill as amended proceeds from the conclusion that in the automobile industry concentration of economic power has increased to the degree that traditional contractual concepts are no longer adequate to protect the automobile dealers under their franchises.

Since World War II, production in the automobile industry has been increasingly concentrated among the three major producers: General Motors Corp., Ford Motor Co., and the Chrysler Corp. In 1946, General Motors produced 46 percent of all passenger cars; by 1954 its share of the market had increased to 52 percent, with Ford producing 31 percent and Chrysler 13 percent. In 1954 the remaining 3 independent automobile producers accounted for only 4 percent of all passenger cars produced. Furthermore, the Department of Justice advised the committee that –

figures thus far for 1956 suggest that General Motors now produces more than 55 percent of all passenger cars in this country.

What is more, competition to the three major automobile producers from independents has failed to materialize in the postwar period; in fact, it has become more remote.

General Motors Corp., with assets of $6,344,772,000, sales amounting to $12,443,277,000, and not [sic] profits of $1,189,477,000, in 1955, was the largest corporation in the United States. The second largest automobile producer in the United States, Ford Motor Co., in 1955 ranked third among American industrial corporations. In 1955, Ford Motor Co. had assets of $2,585,337,000, sales amounting to $5,594,022,000, and net profits of $436,991,000. Chrysler Corp., the third ranking member of the automobile industry in 1955, ranked fifth among United States

industrial organizations and had assets of $1,362,883,000, sales in the amount of $3,466,222,000, and net profits of $100,063,000.

Although automobile dealers are substantial businessmen in their local communities, in comparison with the automobile manufacturer, an individual dealer is a small-business man whose size makes it impossible for him to bargain effectively. In contrast with the economic power of each of the automobile manufacturers, the average dealer has an investment in the amount of $118,000. There are approximately 40,000 franchised automobile dealers in the United States.

Roughly one-half, or 20,000, of these dealers have contracts with General Motors, while 9,000 are franchised by Ford Motor Co.

While the individual automobile dealer may be classified as a small-business man, collectively the automobile-dealer group is of great importance to the economy. Franchised automobile dealers have a total investment in their businesses in the amount of more than $5 billion and employ approximately 668,000 persons.

Extensive testimony was adduced by the committee at the hearings on this bill with respect to both the contractual relationship between automobile manufacturers and their dealers, and marketing practices current in the automobile industry. Distributive conditions condemned by the Federal Trade Commission in its report on the motor-vehicle industry, issued in 1939, have continued up to the present time, according to investigations made by the Subcommittee on Automobile Marketing Practices of the Senate Committee on Interstate and Foreign Commerce

and by the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary.

In 1939, the Federal Trade Commission after an extensive investigation of automobile marketing practices stated:

The Commission finds that motor-vehicle manufacturers, and, by reason of their great power, especially General Motors Corp., Chrysler Corp., and Ford Motor Co., have been, and still are, imposing on their respective dealers unfair and inequitable conditions of trade, by requiring such dealers to accept, and operate under, agreements that inadequately define the rights and obligations of the parties and are, moreover, objectionable in respect to defect of mutuality; that some dealers, in fact, report they have been subjected to rigid inspections of premises and accounts, and to arbitrary requirements by their respective motor-vehicle manufacturers to accept for resale quantities of motor vehicles or other goods, deemed excessive by the dealer, or to make investments in operating plants or equipment without adequate guaranty as to term of agreement or even supply of merchandise; and that adequate provisions are not included for an equitable method of liquidation of such investments, sometimes made at the insistence of the respective motor-vehicle manufacturer.[1]

In connection with its study of the General Motors Corp., the staff of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary reported on automobile distribution systems as follows:

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[1] H. Doc. 468, 76th Cong., 1st sess., Report on Motor Vehicle Industry, p. 1075.

The franchise system for distribution of automobiles has been described as a system devised by the automobile manufacturers to secure maximum rights with a minimum of liability * * *. It may be defined as an agreement by which the manufacturer appoints the dealer to handle his line, and the dealer, in return for this privilege, agrees to conduct his business according to the standards and desires of the manufacturer. It is the method by which the manufacturer assures himself of control over the distribution of his product in what amounts to quasi-integration to the retail level of distribution. The manufacturer can maintain this control because of his superior economic position which he retains by threat of franchise termination.

In various suits in the past, General Motors has characterized its dealer franchise as follows:

1. That it does not constitute a legal contract;

2. That it lacks mutuality, and represents no legally enforceable obligation on the part of the seller to sell or on the part of the dealer to buy;

3. That it provides that the dealer shall perform to the satisfaction of the seller, and that the question of satisfaction is for the seller alone to determine;

4. That no damages are recoverable by the dealer since loss of profits was not contemplated by the parties;

5. That it is unenforceable and void because of indefiniteness, uncertainty, and lack of consideration;

6. That, if valid, the agreement gives the factory the right to terminate at will.

With few exceptions, the courts have sustained the manufacturer's interpretation of the agreement, and the courts have held that dealers fail to state a cause of action when suit is brought on the agreement alone.[2]

The hearings of the investigations conducted during this Congress in the Senate contain numerous instances of automobile manufacturers coercing and intimidating their franchised dealers. A primary source of the manufacturer's power over their dealers stems from the unilateral nature of the franchise agreements.

Automobile dealers who have been subjected to economic duress and intimidation by manufacturers have been unable to obtain redress in the courts. Confronted with express provisions in the dealer's franchise, courts have been reluctant to impose a condition of good faith on the part of the manufacturer. In Bushwick-Decatur Motors, Inc., v. Ford Motor Co. (116 F. 2d 675, C.A. 2, (1940)), the court stated:

With a power of termination at will here so unmistakably expressed, we certainly cannot assert that a limitation of good faith was anything the parties had in mind. Such a limitation can be read into the agreement only as an overriding requirement of public policy.

In Buggs v. Ford Motor Co. (113 F. 2d 618, C.A. 7, (1940)), the court stated:

An examination of its terms, which are many, indicates that it was dictated by the manufacturer at Detroit,

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[2] S. Rept. No. 1879, 84th Cong., 2d sess., Bigness and Concentration of Economic Power – A Case Study of General Motors Corp., p. 79.

and drawn by its counsel with the avowed purpose of protecting the manufacturer to the utmost and granting, if any, few rights to, and the smallest possible protection of, the agent.

It is one which affords some support for the wisdom and the necessity of legislation which protects the weak against a strong party in situations like the instant one.

In adjudicating disputes between manufacturers and dealers, application of contract law concepts by the courts has prevented relief to the dealer. In Ford Motor Co. v. Kirkmyer Motor Co. (65 F. 2d 1001, C.A. 4, (1933)), the court stated:

While there is a natural impulse to be impatient with a form of contract which place the comparatively helpless dealer at the mercy of the manufacturer, we cannot make contracts for parties or protect them from the provisions of contracts which have been made for themselves. Dealers doubtless accept these one sided contracts because they think that the right to deal in the product of the manufacturer, even on his terms, is valuable to them; but, after they have made such contracts, relying upon the good faith of the manufacturer for the protection which the contracts do not give, they cannot, when they get into trouble, expect the courts to place in the contracts the protection which they themselves have failed to insert.

Similarly the court in S. B. McMaster v. Chevrolet Motor Co. (3 F. 2d 469, E.D.,S.C., (1925), stated as follows:

* * * they are entirely within their rights in so framing their contract as to carry out their intention. The intentions of the parties in the absence of any grounds of

public policy must prevail, and their intention must be gathered from the terms of the contract itself.

This bill assures the dealer an opportunity to secure a judicial determination, irrespective of the contract terms, as to whether the automobile manufacturer has failed to act in good faith in performing or complying with any of the provisions of his franchise or in terminating, canceling, or not renewing his franchise.

The committee recognizes that, in response to the congressional investigations and legislative proposals during this Congress, many changes have been made, or are contemplated, in the contractual relationship of automobile manufacturers and their dealers. For example, effective March 1, 1956, General Motor Corp. made available to all its dealers a choice of three selling agreements:

(1) A 5-year agreement cancelable by General Motors only for cause and cancelable by the dealer without cause on 30 days' notice;

(2) A 1-year agreement cancelable by General Motors only for cause and cancelable by the dealer without cause on 30 days' notice;

(3) An indefinite term agreement cancelable by either party without cause on 90 days' notice.

In addition the revised selling agreements of General Motors include new provisions which create important dealer benefits. These new benefits could mitigate many of the conditions which caused complaint under the old franchise. The committee has been informed that Ford Motor Co. also is considering revising its franchise agreements in order to provide its dealers benefits comparable to those recently made available by General Motors.

While it is true these developments in the automobile industry may diminish some of the abuses found to exist, this does not derogate from the necessity for legislation at this time. For one thing, the new General Motors selling agreements afford no guaranty against dealer coercion or intimidation or threats thereof by the manufacturer. Furthermore, what the automobile manufacturers do in response to congressional investigation or in contemplation of pending legislation, they can readily undo. The record before the committee demonstrates that, in the past, gains made by dealers after investigation into market practices of the automobile manufacturers have not always been retained. This bill assures a minimum amount of protection for the dealer under the terms of any automobile franchise.

## EXPLANATION

Section 1 of the bill defines 'automobile manufacturer,' 'automobile dealer,' 'franchise,' 'commerce,' and 'good faith.'

Section 1(a) limits an 'automobile manufacturer' to those concerns engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons. Included in the definition of an automobile manufacturer is a concern which acts for 'and is under control of' the manufacturer in connection with the distribution of automotive vehicles. The quoted language has been added by the committee to make it clear that the manufacturer is liable only for his own 'coercion, intimidation, or threats of coercion or intimidation' or the acts of agents or distributors subject to his control.

The words 'or other automotive vehicles' which appears in section 1(a) of the bill passed by the Senate have

been stricken in order to limit the bill's coverage to manufacturer-dealer transactions involving the distribution of passenger cars, trucks, and station wagons. The amendment, therefore, excludes transactions involving buses, tractors, motorcycles, and other transportation vehicles propelled by power. This accomplishes two purposes: First, it avoids any ambiguity resulting from use of the phrase 'or other automotive vehicles'; second, it restricts the bill to those areas of automotive distribution in which congressional committees have ascertained a present need for remedial legislation.

Section 1(b) of the bill defines 'franchise' to mean the written agreement or contract between an automobile manufacturer and dealer. The bill approved by the Senate gives broader meaning to the term 'franchise' by including not only the written agreement or contract but also any 'understanding or arrangement between any automobile manufacturer and any automobile dealer.' The words 'understanding or arrangement' have been deleted in order to safeguard against the possible inclusion of anti-competitive trade arrangements between the manufacturer and the dealer, such as arrangements which might limit the location of new dealers.

Another amendment to section 1(b) adds the term 'engaged in commerce' to make it clear that this legislation prescribes rules governing commerce in the automobile industry.

Section 1(c) has been amended to define an automobile dealer as any concern 'resident in the United States or in any Territory thereof or in the District of Columbia,' operating under the terms of a written franchise and engaged in the sale of passenger cars, trucks, or station

wagons. This amendment limits the right to bring suit in the district courts of the United States to dealers resident in the United States or its Territories. The record before the committee was concerned only with coercive practices by manufacturers with respect to their United States dealers. The committee has no information with respect to such practices involving dealers situated in foreign countries.

Section 1(d) defines the term 'commerce.'

Section 1(e) declares 'good faith' to mean the duty of the automobile manufacturer and his franchised dealer to act in a fair and equitable manner toward each other so as to guarantee the one-party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party. A proviso has been added by the committee to assure that recommendation, endorsement, exposition, persuasion, urging, or argument of the kind that is normal in competitive commercial relationships is not to be deemed by itself to constitute a lack of good faith.

By contrast section 1(e) of the bill approved by the Senate would require each party to a franchise to act in a –

fair, equitable, and nonarbitrary manner so as to guarantee such other party freedom from coercion, intimidation, or threats of coercion or intimidation, so as to preserve all equities of such other party which are inherent in the nature of the relationship between such parties by such franchise.

The committee's amendment to section 1(e) has four purposes. First, it makes it clear that the manufacturer is obligated to protect his dealer only from coercion by the

manufacturer or persons subject to this control, and that there is no obligation on the part of the manufacturer to protect the dealer against coercion from other sources. Second, the word 'nonarbitrary' is stricken for being vague and indefinite. Third, the committee deleted the provision which would require a party to a franchise to preserve 'all the equities' of the other party which are inherent in the nature of the franchise relationship. This has been done to preclude any interpretation inconsistent with antitrust principles. Fourth, a proviso has been added to affirm that normal sales persuasion and recommendation by itself is consonant with good faith.

Against this background, section 2 authorizes a franchised dealer to bring suit against the manufacturer in an appropriate United States district court without respect to the amount in controversy, to recover damages by reason of the manufacturer's failure, after the passage of the act, to act in good faith in the performance of the franchise or in terminating, canceling, or not renewing the franchise. The manufacturer, in addition to any other defense, is given the right to defend a dealer action by showing that the dealer failed to act in good faith from and after the passage of this act. In order to sustain this defense, the manufacturer would be required to show that the dealer failed to act in a fair and equitable manner toward the manufacturer so as to guarantee the manufacturer freedom from coercion, intimidation, or threats of coercion or intimidation from the dealer.

Present section 2 differs in several respects from the corresponding section of the bill approved by the Senate. In the bill as amended, only activities by the manufacturer which occur from and after the passage of this measure are actionable. The purpose of this change is to avoid

liabilities based on past acts which were not illegal when committed.

The committee had deleted the right to a reasonable attorney's fee as an element of damages. Under the amended bill, the dealer would be limited to recovery of damages sustained and the cost of suit.

The Committee has added three sections to the bill approved by the Senate. Section 3 prescribes a 3-year statute of limitations for dealer suits.

Section 4 affirms that no provision of the antitrust laws is repealed, modified, or superseded, directly or indirectly, by any provision of the bill.

Section 5 declares that no provision of this bill invalidates any provision of the laws of any States except insofar as there is a direct conflict which cannot be reconciled.

The principal effect of the bill as amended by the committee is to give the dealer a right of action against the manufacturer, where the manufacturer fails to act in a fair and equitable manner so as to guarantee the dealer freedom from coercion, intimidation, or threats of coercion or intimidation. The term 'fair and equitable' as used in the bill is qualified by the term 'so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party.' In each case arising under this bill, good faith must be determined in the context of coercion or intimidation or threats of coercion or intimidation. Each party to an automobile franchise would have a special obligation to guarantee the other party freedom from coercion or intimidation of any kind.

The existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct. For example, manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts, accessories, or supplies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation. Similarly coercion or intimidation may be found where the manufacturer attempts to require the dealer to handle exclusively, or sell a specified quota of, parts, accessories, and tools made or approved by the manufacturer.

If the evidence discloses normal sales recommendation or persuasion the manufacturer would not be liable. On the other hand, if the manufacturer goes beyond normal sales recommendation or persuasion, in appropriate circumstances, his activities could give rise to a cause of action under the bill. Evidence with respect to manufacturer recommendations or persuasion will be relevant as bearing upon the issue of coercion or intimidation.

Manufacturer coercion or intimidation or threats thereof is actionable by the dealer where it relates to performing or complying with any of the terms or provisions of the franchise, or where it relates to the termination, cancellation, or nonrenewal of the dealer's franchise. Thus, where a dealer's resistance to manufacturer pressure is related to cancellation or nonrenewal of his franchise a cause of action would arise.

The bill, however, does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the bill curtail the

manufacturer's right to cancel or not to renew an inefficient or undesirable dealer's franchise.

The bill does not freeze present channels or methods of automobile distribution and would not prohibit a manufacturer from appointing an additional dealer in a community provided that the establishment of the new dealer is not a device by the manufacturer to coerce or intimidate an existing dealer. The committee emphasizes that the bill does not afford the dealer the right to be free from competition from additional franchise dealers. Appointment of added dealers in an area is a normal competitive method for securing better distribution and curtailment of this right would be inconsistent with the antitrust objectives of this legislation. Under the bill, a manufacturer does not guarantee the dealer profitable operation or freedom from depletion of investment.

The manufacturer's obligation to act in good faith extends to all of his franchised dealers, including: dealers who sell automobiles to other dealers, franchised or not, for resale to the public; dealers who sell outside of a 'zone of influence' or 'territory'; and dealers who sell automobiles at less than the manufacturers' suggested resale prices. Contract provisions restricting an automobile dealer from transacting business with customers of his chose [sic], or from selling outside a specified territory could violate the antitrust laws. Any restriction on a dealer's right to sue based on the fact that he is selling to another dealer, franchised or not, for resale to the public or based on the fact that he sells outside of a territory or sells as cut rates would contravene the congressional purposes underlying section 4 of this bill which provides that this measure shall not repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws.

Similarly, a manufacturer, in a dealer's suit for damages stemming from a manufacturer's refusal to supply adequate cars, could not set up by way of defense, as lack of good faith, the fact that the dealer sold new cars to other new or used car dealers for resale to the public. Also, a dealer sold new cars to other new or used car dealers for resale to the public. Also, a dealer located new another franchised dealer who has sold new cars to used car dealers for resale would not be authorized under this measure to sue a manufacturer for supplying dealers who sell cars to other dealers for resale.

## MINORITY REPORT

The purpose of this bill is to give automobile dealers additional remedies for abuses allegedly suffered at the hands of automobile manufacturers. While we would not object to the granting of appropriate legal protection by statute, if necessary, we believe the present bill adopts the wrong approach and will be for the most part ineffective. Beyond that, we believe the bill establishes an unfortunate precedent, novel in our system of Federal jurisprudence.

In substance, the bill provides that one party to a contract may sue another to recover damages on the ground that he was not dealt with in good faith, although he may have no right to recovery and have no cause of action under established contract law. By section 2, a new cause of action is established as follows:

Automobile dealers may bring suit against any automobile manufacturer * * * and shall recover the damages by him sustained * * * by reason of the failure to [sic] said automobile manufacturer * * * to act in good faith in performing or complying with the terms of the franchise,

or in terminating, canceling, or not renewing the franchise with said dealer. * * *

The term 'good faith' is defined in section 1(e) to mean the duty of each party to a franchise:

* * *to act in fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party. * * *

A most serious defect of this bill is its interference with the right of contract. Throughout the history of American jurisprudence, and indeed the common law itself, the individual has been free to enter into a lawful contract when, and as, he, in his own judgment, saw fit. Concomitantly, he has been held responsible for the obligations he has assumed. Freedom to contract has been the keystone of our free-enterprise system.

This bill, it must be recognized, interferes with the individual's right to contract. Hereafter, when an automobile franchise terminates by its terms, the manufacturer cannot, with complete freedom, elect not to renew the contractual relationship. Under this bill, the manufacturer will be able to refuse to renew his contractual relationship only on penalty of suit for alleged failure to act in 'good faith.'

For example, an automobile franchise may be expiring and the manufacturer may have several applications for the dealership. Although the existing dealer may be less efficient in the opinion of the manufacturer than one of the applicants, the manufacturer will be required as a practical matter to renew the existing dealer's franchise or face a lawsuit. The effect of the bill, in short, will be to require

the manufacturer to show special consideration to the existing dealer and to freeze the inefficient dealer into the automobile distributive system. A further effect will be to deprive newcomers of a fair opportunity to enter the automobile-dealer business.

It is vital to the efficient distribution of automobiles that the manufacturer have the right to choose their own dealers. When the manufacturer-dealer relationship is on a mutually satisfactory basis, it is to the manufacturer's own best interest that he retain the dealer. It is only when the relationship is nonproductive that the manufacturer has reason for not continuing the dealer. If freedom of contract is to have meaning, the manufacturer and the dealer must be permitted to renew or not renew their relationship as they see fit.

As a matter of fact, the problem of nonrenewal has not been serious in the manufacturer-dealer relationship. For example, nonrenewal and involuntary termination by General Motors Corp. in the period 1951 through 1955 have been insignificant in that company's franchise operations. The following chart demonstrates that out of the more than 20,000 General Motors' dealers, only 178 franchises were not renewed in 1955:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

For the most part, General Motors dealer franchises have been enduring. As of May 31, 1956, over 50 percent of General Motors dealers had held franchises for over 10 years, and 70 percent had been associated with the company for 5 years or more, as indicated in the following chart:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Ford Motor Co. records show that during the 10-year period, 1946 through 1955, the number of dealers holding franchises for one or more lines of cars manufacturer [sic] by the company averaged 7,553 per year. The total number of terminations for unsatisfactory representation during this 10-year period was 224.

Thus, there was an average of slightly more than 22 terminations, or less than one-third of 1 percent of the dealer body, per year.

This bill is special class legislation which imposes upon manufacturers of automobile vehicles duties and burdens which are not imposed upon other manufacturers whose products are sold to dealers under franchise arrangements. It is difficult to understand why the bill applies only to the automobile industry and not to other industries, such as the home appliance, tire, farm implement, gasoline retailing and other industries where there is a manufacturer-dealer franchise relationship. Certainly, if this bill is necessary in the automobile industry, it should be equally applicable to all industries in which there are manufacturers doing business through franchise dealers.

Furthermore, only one witness, Dr. Lloyd Halvorsen, chief economist of National Grange, representing consumer groups testified in the course of the hearings. Except for testimony from Government agencies, all other witnesses were either manufacturer or dealer representatives. In this context, it is significant that the representative of the consuming and using group testified that the bill would have unfortunate repercussions on other

segments of the economy, and that its enactment necessarily would lead to higher automobile prices. What is more, while the bill requires the manufacturer and the dealer to act in good faith in their dealings with each other, there is nothing in the measure to assure that either of the parties will deal in good faith with the consuming public.

The bill deviates from basic principles in another important respect. Contrary to traditional legal concepts, it imposed no requirement of mutuality of obligation between private parties to sue the manufacturer but on the other, grants no corresponding right to the manufacturer, thus subordinating the interests of the manufacturers to the interests of the dealers. The present situation in the automobile industry does not justify enactment of legislation which establishes obligations not equally applicable to both parties to the contract. Furthermore, it can hardly be contended that the defense afforded the manufacturer against a dealer suit is an adequate substitute for an independent right of action by the manufacturer based on the dealer's lack of 'good faith.'

The inevitable result of this bill will be to promote unnecessary litigation and to provoke an atmosphere of suspicion and antagonism in manufacturer-dealer relations. Beyond encouraging the nonrenewed dealer to seek legal redress for damages, litigation will be stirred up in another respect. Under the bill, the manufacturer may be sued if he fails to act in a fair and equitable manner so as to guarantee the dealer freedom from coercion or intimidation, or threats thereof. However, 'recommendation, endorsement, exposition, persuasion, urging, or argument' does not constitute coercion or intimidation. It is perhaps unnecessary to indicate how difficult it will be for the courts to draw the line between recommendation, argument, or persuasion,

on the one hand, and coercion or intimidation, on the other. Before definitive content is given to these generalized concepts, many court adjudications will be required. Meantime manufacturers will hesitate to embark on aggressive sales campaigns with their dealers to assure growing production and distribution, for fear of dealer suits charging coercion or intimidation. This cannot help but impair the vitality of the present production and distributive processes in the automobile industry.

In fact, if this bill is enacted, neither party to an automobile franchise can know what the terms of their contract are until the lower courts, and ultimately the Supreme Court, have construed the application of the bill's 'good faith' provision to each franchise.

We recognize that in the past there have been numerous complaints by automobile dealers. The most persistent complaint on the part of automobile dealers has been directed against so-called bootlegging of new automobiles. This is the practice whereby franchise dealers sell new automobiles to used-car dealers for resale to the public. This bill, in contrast to the claims made by certain proponents, does not in any way curb bootlegging. The fact is that the bill would encourage this practice for the reason that a bootlegging dealer has the same rights as against his manufacturer as any other franchise dealer. Nor can a manufacturer interpose as a defense to a dealer's suit the fact that the dealer was engaged in bootlegging new automobiles.

Many dealer complaints stemmed from the fact that under the terms of franchise agreements, manufacturers could arbitrarily terminate a dealer's franchise without recourse by the dealer for the loss of the value of the

franchise and his capital investment. We also recognize that in the past numerous dealers have been subjected to coercion or intimidation by manufacturers. This, too, has been made possible, in large part, by the manufacturer's right under the contract to terminate without cause. In recent months, however, the automobile industry has taken effective steps to ameliorate these conditions.

The General Motors Corp., for example, has made basic revisions in its selling agreements. Now the dealer may, at his election, secure a 5-year franchise which cannot be terminated by the factory except for cause. The dealer, on the other hand, can terminate the franchise on 30 days' notice without cause. This new agreement contains additional and substantial benefits for the dealer.

Similarly, the Ford Motor Co. has announced an alternative form of 5-year contract which likewise will be terminable by the manufacturer only for cause. The competitive nature of the industry will undoubtedly require the other manufacturers to offer comparable contracts to their dealers.

We regard it as most unlikely that the manufacturers would discontinue these favorable provisions in the new franchise arrangements. But in any event, no change can be made until the expiration of the present contract's 5-year term.

Against this background, it is evident that the industry has taken clear and positive action to remedy the abuses found to have existed. This legislation does not add, appreciably, to the remedies voluntarily provided by the industry itself. We feel, therefore, that, while Federal legislation of some character may ultimately prove to be required, precipitous and unprecedented action during the

closing days of this Congress is unwarranted and unnecessary.

WILLIAM M. McCULLOCH.

HUGH SCOTT.

## ADDITIONAL VIEWS

The purpose of this bill is to give further legal protection to automobile dealers from certain alleged abuses and hard practices to which, it was testified, they had been subjected.

I agree with that purpose, and believe that every reasonable legal protection should be given to the dealers in view of their unequal bargaining position and of the hard practices to which they have been subjected. I favor giving them the best legal remedy possible.

I believe, however, that this bill adopts the wrong approach, that the remedy which it offers would be ineffective, and is based on unprecedented legal principles.

This bill provides that a person may bring suit based on a contract relationship and recover damages on the ground that he was not dealt with in good faith. Such a provision sets up a new, untested cause of action, unknown in American jurisprudence, and which violates every concept of sound legal principle.

The actual words of the bill, in section 2, are as follows (for purposes of emphasis, words not material to this argument are omitted):

An automobile dealer may bring suit against any automobile manufacturer, * * * and shall recover the

damages by him sustained * * * by reason of the failure of said automobile manufacturer * * * to act in good faith in performing or complying with any of the terms or provisions of the franchise * * * .

There is no need for this unprecedented type of relief because there is now available a whole procedure and type of relief which is suitable to fit the problem here presented. That is to give the Federal Trade Commission adequate authority to regulate this type of situation and compel fair dealing between the parties.

The tried and tested procedure of the Federal Trade Commission is particularly suited to this type of problem, involving as it does complicated commercial relationships and questions of dealing in good faith between the parties.

It might be desirable to pass legislation providing the Federal Trade Commission with special powers appropriate to this particular need. In fact, a bill to accomplish that very object was favorably reported on July 17 by the Senate Committee on Interstate and Foreign Commerce, S. 3946, a bill filed by Senator Monroney of Oklahoma and others.

This bill provides that certain practices in automobile marketing, of the sort complained of before the subcommittee, 'shall be deemed an unfair method of competition and unfair act or practice in commerce.' With that addition to existing law, the Federal Trade Commission would be in a position to provide an adequate and proper remedy.

The Federal Trade Commission has very broad powers. It can look into unfair practices on its own initiative, without complain [sic] having been made. It can issue a cease-and-desist

order, and severe penalties are provided for violation of such an order.

The Commission has broad power of investigation, and if it finds an unfair trade practice within its jurisdiction needing correction, it can file a complaint. Or, under its general powers, it can proceed more informally and call a trade practice conference at which the interested parties and the Commission can work out the best means of remedying the condition.

Where this well-tested and reliable remedy is available, I submit that it is the wrong approach to attempt to set up a new, unsound, untested cause of action, such as that here involved.

LAURENCE CURTIS.

(Note: 1. PORTIONS OF THE SENATE, HOUSE AND CONFERENCE REPORTS, WHICH ARE DUPLICATIVE OR ARE DEEMED TO BE UNNECESSARY TO THE INTERPRETATION OF THE LAWS, ARE OMITTED. OMITTED MATERIAL IS INDICATED BY FIVE ASTERISKS: * * * * *.

2. TO RETRIEVE REPORTS ON A PUBLIC LAW, RUN A TOPIC FIELD SEARCH USING THE PUBLIC LAW NUMBER, e.g., TO(99-495))